SUPREME COURT

OF THE UNITED STATES.

October Term, 1897.

No. 190.

THE GREEN BAY AND MISSISSIPPI CANAL COMPANY,

Plaintiff in Error,

vs.

KAUKAUNA WATER POWER COMPANY, MATTHEW J. MEADE, HARRIET S. EDWARDS, MILWAUKEE, LAKE SHORE & WESTERN RAILWAY COMPANY, G. LIND, JOSEPH CARLSON, BROKAW PULP COMPANY, BADGER PAPER COMPANY, B. AYMAR SANDS, JOSEPH KLINE, AND MICHAEL A. HUNT, IMPLEADED WITH THE PATTEN PAPER COMPANY (LIMITED), AND OTHERS,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

BRIEF OF DEFENDANTS IN ERROR ON MOTION TO DISMISS.

Action was brought in Outagamie County Circuit Court, Wisconsin, by Patten Paper Company (Limited), Union Pulp Company and Fox River Pulp and Paper Company against Kaukauna Water Power Company, Green Bay and Mississippi Canal Company and others to

First: Determine and adjudicate what share or proportion of the entire natural flow of Fox River, Wisconsin, is appurtenant to and of right should be permitted to flow in the south, middle and north channels of said river respectively, and

Second: Restraining the defendant, Kaukauna Water Power Company and all persons and corporations claiming under it from drawing from said Fox River above the head of Island Number 4, and passing around and below the head of said Island Number 4, and so that same shall not come into the middle channel of said river and into plaintiff's mill pond called the Meade and Edwards Water Power, more water, flow of said river, than the one-sixth part thereof, or more than the amount which by nature was appurtenant to and flowed in said south channel of said river. (Transcript p. 121.)

It was alleged in plaintiff's complaint that all parties interested in the amount of water appurtenant to the said south, middle and north channels of said Fox River, where same passes Island Numbers 3 and 4, were named as plaintiffs or defendants in said action. (Transcript p. 121.)

Several of the defendants demurred to the plaintiff's complaint, which demurrers were overruled by the court and from which orders appeals were taken to the Supreme Court of Wisconsin, which court affirmed the orders appealed from. (Transcript pp. 34-49.)

Afterwards defendant Kaukauna Water Power Company and other defendants claiming under it served and filed their answer to plaintiff's complaint controverting many of the allegations of said complaint, and especially those relating to the amount of water which passed through the north, middle and south channels of said river in a state of nature. (Transcript pp. 130-136.)

March 10, 1890, the defendant, Green Bay and Mississippi Canal Company, served its answer to the plaintiff's complaint, wherein, after admitting and denying various allegations of the said complaint, it made two separate defenses in bar and by way of counter-claim to the plaintiff's cause of action and also a separate defense in bar and by way of limitation, and prayed

for affirmative relief that any decree to be entered in the action determining and adjudicating what share or proportion of the flow of said Fox River, where the same passes said Islands Numbers 3 and 4, was appurtenant and of right should be permitted to flow in the south, middle and north channels of said river respectively, should declare and be made subject to the right of said defendant so answering to use all of the water power created by the government dam on its own lands on the north side of said river or elsewhere as it should see fit, and that the apportionment of the flow of the river so to be made should be confined to such part of the river, if any, as should not be so used, and should be permitted to flow in the channel of said river below said dam. (Transcript pp. 50-61.)

It was stipulated and agreed in said action between said defendant, Green Bay and Mississippi Canal Company, and the said defendant, Kaukauna Water Power Company, and other defendants claiming under it, that said answer of said defendant, Green Bay and Mississippi Canal Company, might stand as and have the effect of a cross bill or cross complaint in said action. (Transcript pp. 61, 62.)

Afterwards said defendant, Green Bay and Mississippi Canal Company, moved the court for leave to file and serve an amended answer to the plaintiff's complaint. (Transcript pp. 62-82.) Such motion was opposed by the defendant Kaukauna Water Power Company and others but was granted by the court. (Transcript pp. 102-105.)

The defendants, Kaukauna Water Power Company, and others, appealed to the Supreme Court of the State of Wisconsin from the said order granting leave to the said defendant, Green Bay and Mississippi Canal Company, to file and serve its amended answer, but the said order so appealed from was affirmed by said Supreme Court. (Transcript pp. 106-109.)

The plaintiffs replied to the said amended cross bill or cross complaint of the defendant Green Bay and Mississippi Canal Company controverting many of the allegations thereof and the titles and rights set up and claimed therein by said defendant. (Transcript pp. 151-156.)

The defendant Kaukauna Water Power Company and other defendants claiming under it answered the said amended cross complaint of the defendant Green Bay and Mississippi Canal Company, wherein they controverted many of the allegations contained in said amended cross complaint, and also the titles and rights set up and claimed therein by said defendant Green Bay and Mississippi Canal Company. (Transcript pp. 156-166.)

The defendants, Henry Hewitt, Jr., and William P. Hewitt, each answered the said amended cross complaint of the defendant Green Bay and Mississippi Canal Company, denying many of the allegations thereof and controverting the titles and rights set up and claimed therein by said defendant. (Transcript pp. 167-185.)

January 18, 1893, the said Circuit Court for Outagamie County, upon application of the defendant, Green Bay and Mississippi Canal Company, made an order changing the place of trial of said action to the Superior Court of Milwaukee County, Wisconsin. (Transcript p. 186.)

December 9, 1893, the trial of said action was commenced before the Honorable Robert N. Austin, one of the Judges of said Superior Court of Milwaukee County, without a jury. (Transcript p. 196.) Upon such trial the parties agreed that by the fair result of the testimony in the case, the natural flow of the river in the different channels was as follows: Forty-three two-hundredths in the south channel, sixty-two two-hundredths in the middle channel, and ninety-five two-hundredths in the north channel below the mouth of middle channel. Such agreement was made subject to whatever decision the court might make upon the issues raised by the cross complaint of Green Bay and Mississippi Canal Company and the several answers thereto. (Transcript p. 492.) This agreement eliminated the controversy raised by the plaintiff's complaint and the several answers thereto as to the natural flow of the river in the several channels mentioned, and left for trial only the issues raised by the cross complaint of the defendant Green Bay and Mississippi Canal Company, and the several answers of the other parties to the action thereto.

Upon such trial the said issues were found in favor of the Green Bay and Mississippi Canal Company, and January 19, 1894, said Superior Court rendered judgment in said action whereby it adjudged that said Green Bay and Mississippi Canal Company was the owner of and entitled as against all of the parties to the action, their successors, heirs and assigns, to the full flow of the river not necessary for navigation, from the said upper or government dam across the Fox River at Kaukauna, and was not obliged to permit any of the water of the river or pond to flow over the dam, but was entitled to withdraw from the pond made by said dam all of the surplus waters not necessary for navigation, either through the canal extending from the pond to slack water below the rapids or directly from the pond, and use the same from said canal or said pond and let such water to others to be used wherever it might be available for water power, and was not obliged to permit any of the water from the river or pond to flow over said dam, and forever enjoining the other parties to the action from interfering with said Green Bay and Mississippi Canal Company in so withdrawing and using such water.

It was further adjudged as in favor of the Patten Paper Company, against all the other defendants, that all of the water of the river which was permitted by the Green Bay and Mississippi Canal Company to flow over the upper dam or into the river above Island Number 4, so as to pass down the river, should be and was thereby divided and apportioned between and to the south, middle and north channels of the river in the proportions agreed upon by the parties to said action upon said trial as hereinbefore stated, and forever enjoining the other parties to said action, their heirs, successors and assigns, from interfering with the waters of said river so permitted to flow over the dam or into the river above Island Number 4, so as to prevent their flowing into said channels in the proportions so adjudged. Said judgment also awarded costs to the said Green Bay and Mississippi Canal Company and against the several parties who had answered its cross complaint. (Transcript, pp. 194-196.)

The plaintiffs in the original action, the defendant Kaukauna Water Power Company, and the other defendants claiming under it, and the defendants Henry Hewitt, Jr., and William P. Hewitt, each appealed to the Supreme Court of the State of Wisconsin from the said judgment. (Transcript pp. 532-537.) Upon such appeals said judgment of said Superior Court was reversed and said cause was remanded to said Superior Court with directions to enter judgment in accordance with the opinion of such Supreme Court. (Transcript, pp. 551-553.)

(For the opinion of said Supreme Court see Transcript pp. 540-546.)

Said Green Bay and Mississippi Canal Company moved said Supreme Court for a rehearing in said appeals, which motion was denied. (Transcript pp. 547-548.)

(For the opinion of said court upon said motion for rehearing see transcript pp. 549-550.)

Upon the remanding of said cause to said Superior Court said last mentioned court, September 27, 1895, entered judgment therein as directed by said Supreme Court whereby it adjudged

First: As in favor of the plaintiffs and against all of the defendants, that all of the water of the river except that required for purposes of navigation should be and was thereby divided and apportioned between and to the south, middle and north channels of said river in the proportions agreed upon by the parties upon the trial of said action, and forever enjoining each of the parties to the action, their heirs, successors and assigns, from interfering with the waters of said river so as to prevent their flowing into the said channels in the proportions so adjudged;

Second: And further adjudging upon the issues joined by the cross complaint of the defendant Green Bay and Mississippi Canal Company and the several answers made thereto by the other parties to the action that the water power which was created incidentally by the erection of said dam at Kaukauna was due to the gravity of the water as it fell from the crest to the foot

of the *dam proper* across said river and not to the use of the water of said river through said canal, and that neither said State of Wisconsin nor said Green Bay and Mississippi Canal Company, as assignee of said state, ever acquired or owned any water power upon said river at Kaukauna by reason of or as incidental to the construction and use of said canal for navigation;

Third: Further adjudging that said Green Bay and Mississippi Canal Company, its successors and assigns, should so use the water power, if at all, created by said dam, as that all the water used for water power or hydraulic purposes should be returned to the stream in such manner and at such place as not to deprive the appellants or those claiming under or through them of its use as it had been accustomed to flow past their banks, and that it should flow past the lands of said appellants on said river and in the several channels of said river below said dam as it was accustomed to flow, and that said appellants have the right to use the water of said river, except such as was or might be necessary for navigation, as it was wont to run in a state of nature without material alteration or diminution; and

Fourth: Further adjudging that the relief demanded in said cross complaint be denied except as thereinbefore adjudged. Said judgment also awarded costs against said Green Bay and Mississippi Canal Company in favor of the plaintiffs and the other parties to said action who had answered said cross complaint. (Transcript, pp. 554-556.)

Upon the application for said last named judgment and before said judgment was entered said defendant Green Bay and Mississippi Canal Company moved said Superior Court for leave to amend its answer or cross complaint in said action (Transcript, pp. 560-568), which motion was denied by said Superior Court for that no amendment of the pleadings was allowable at that stage of the action. (Transcript, p. 568).

The defendant Green Bay and Mississippi Canal Company appealed to the Supreme Court of the State

of Wisconsin from certain parts of the said judgment rendered in the said Superior Court, September 27, 1895. (Transcript, pp. 571-575.) The other parties to said action, being those who had answered said cross complaint, moved said Supreme Court to dismiss said appeal for that the judgment appealed from had been entered in accordance with and in execution of the mandates of said Supreme Court, and was in fact and effect a judgment of said Supreme Court. Said motion was granted March 10, 1896. (Transcript, pp. 576-578.)

(For the opinion of said Supreme Court upon the granting of said motion see transcript, pp. 578-580.)

Afterwards said Green Bay and Mississippi Canal Company moved said Supreme Court to vacate its said order of March 10, 1896, dismissing said last mentioned appeal and to reinstate said cause in said court, (Transcript, pp. 581-592) which motion said Supreme Court denied on the sixth day of May, 1896. (Transcript, pp. 592-593.)

(For opinion of said court upon the denial of said motion see transcript, pp. 593-594.)

The final judgment sought to be reviewed upon the writ of error sued out of this court is that entered in the Superior Court of Milwaukee County, Wisconsin, on the 27th day of September, 1895, pursuant to the mandate of the Supreme Court of said state. Such writ was directed to said Supreme Court where the record in the case happened to be at the time by reason of the appeal which had been taken from said judgment to said Supreme Court by the plaintiff in error and which said appeal had theretofore been dismissed by said Supreme Court as hereinbefore stated. The writ of error recites that in the record and proceedings and also in the rendition of said final judgment in said suit there "was drawn in question the validity of a title, right and privilege claimed by the Green Bay and Mississippi Canal Company under statutes of the United States and under authority exercised under the United States," and that "the decision was against the title, right and privilege

specially set up and claimed by said canal company under said statutes and authority."

The plaintiff in error assigns error on eleven grounds: (Transcript, pp. 8-15.)

1st. That the complaint and the respective answers to the plaintiff in error's cross complaint are demurrable;

2nd. That the court erred generally;

3rd, 4th, 5th and 6th. That the plaintiff in error had specially set up and claimed in its said cross complaint and other proceedings in said suit, a title, right and privilege to certain water powers along the line of water communication between the Wisconsin River and the mouth of the Fox River created by the dams and other works of improvement, and an easement in said line of water communication, its locks, dams and canals, for the protection and preservation thereof, under certain acts of congress and authority exercised under the United States, and that the decision embodied in said judgment sought to be reviewed, was against the said title, right and privilege so specially set up and claimed. The acts of congress referred to in said assignments of error are those approved respectively August 8, 1846, July 7, 1870, and July 10, 1872.

7th, 8th, 9th, 10th and 11th. That the decision and judgment violated the fourteenth amendment to the constitution of the United Staets.

SUBSTANCE OF RECORD RELATING TO ISSUES TRIED.

COMPLAINT IN ORIGINAL ACTION.

The complaint shows that the Fox is a public river and flows through Township number 21, North of Range number 18 East, in Outagamie County, Wisconsin, and at this point is of large volume, having a flow of about three hundred thousand cubic feet of water per minute during the ordinary stage of water in same; that where said river passes between Sections 21 and 22 south of the river, and Section 24 and certain private claims north

of the river, it is divided into several separate channels by four islands; that the upper island Number 4 is about 135 rods long with the stream and lies next to the south shore of the river and extends about 70 rods up stream above the head of island number 3; that island number 3 lies partly between island number 4 and the north bank of the river and is about 115 rods long with the stream and extends about 50 rods below the foot of island number 4; that island number 2 lies south of lower end of island number 3, and island number 1 lies south of island number 2 and the foot of island number 4 and between that and the south shore. The channel between the south shore and island number 4 is called the south channel, the channel between island number 4 and island number 3 is called the middle channel, and the channel between island number 3 and the north shore is called the north channel. That plaintiffs owned certain water powers and mills upon said middle channel; that a dam had been built across said river about 100 rods above the head of island number 4, and that the defendant Kaukauna Water Power Company had built a wide and deep canal from the mill pond above said dam along in line with and south of the south bank of said river to a point below the lower end of island number 4, which was large enough to pass and was intended to pass half the flow of said river; that the United States owns and controls said dam above island number 4 and also the canal on the north side of the river so far as necessary for the maintenance of navigation and the use of the water of the river for that purpose, and that subject to such claim and interest the Green Bay and Mississippi Canal Company owns the same; that is, so far as necessary for the maintenance and use of the same for hydraulic power, subject to the paramount right and for navigation.

The complaint also alleged the ownership of the lands bordering the river on the north and south sides and upon the islands bordering the three channels above mentioned at the time of the commencement of the suit, from which it appears that the Kaukauna Water Power Company owned the land bordering the south side

of the south channel from above the head of island number 4 to below the head of island number 1, and was also owner of undivided shares of islands numbers 1, 3 and 4. That that part of fractional section 24, bordering on said north channel was owned by the Green Bay and Mississippi Canal Company; that part of private claim number 1 bordering on said north channel was owned by the Green Bay and Mississippi Canal Company, Henry Hewitt, Jr., and William P. Hewitt, and that that part of private claim number 35 bordering on said north channel was owned by the Chicago and North-Western Railway Company; that island number 2 was owned by M. A. Hunt and Anna Hunt as tenants in common; that the Green Bay and Mississippi Canal Company, Harriet S. Edwards and Matthew J. Meade own undivided shares of islands numbers 1, 3 and 4, and that Henry Hewitt, Jr., owned the undivided half of about three acres at the upper end and on north side of said island number 3: that the Green Bay and Mississippi Canal Company had a canal leading from the mill pond mintained by said dam across Fox River above said island number 4, along in line with and north of the north bank of said river to a point below the head of said island number 3, being the government canal constructed and used for the purposes of navigation, which canal was large enough to pass and was intended to pass at least one-half of the flow of said river and to pass the same down said canal and into said river at a point below the head of said island number 3, and below the mouth of said middle channel, and that said Green Bay and Mississippi Canal Company and its lessees and tenants were and had for several years, and proposed to and would continue drawing and passing through said canal on the north side of said river from the point maintained by said dam to a point below the head of island number 3, and so that it could not pass into said middle channel and into the mill pond furnishing water for plaintiff's mills, about one-half of the flow of the Fox River, and the half appurtenant to the said north channel.

We have not stated all of the allegations of the com-

plaint in the original action but only such parts thereof as we deemed necessary in order to throw light upon the statements hereinafter made in relation to the issues which were tried in said action. (Transcript, pp. 112-121.)

ANSWER AND CROSS COMPLAINT OF GREEN BAY AND MISSISSIPPI CANAL COMPANY.

I.

In the first general subdivision of said answer and cross complaint certain allegations of the complaint in the original action are admitted and certain other allegations of said complaint are denied.

II.

The second general subdivision of said answer and cross complaint states that it is a separate defense and bar to the plaintiff's cause of action and a counter claim thereto, and shows that the Fox river is a navigable stream and flows through township 21 north of range 18 east in the county of Outagamie, Wisconsin; that in said Fox river, below Lake Winnebago, there are and always have been rapids and abrupt falls and any improvement of the navigation of said river so as to secure slack water in navigation through or by said rapids and falls would necessarily require the building of dams, locks and canals at great expense; that to aid in the improvement of said Fox river and of the Wisconsin river contiguous thereto, and to connect the same by a canal, the United States did, by act of congress approved August 8, 1846, grant to the state of Wisconsin on its admission into the Union a large amount of public lands for the expressed purpose of and in trust for improving the navigation of said Fox and Wisconsin rivers; that said state accepted said grant of land for the uses and purposes expressed in said grant on the 29th day of June, 1848, and by an act of its legislature, approved August 8, 1848, undertook the improvement of said rivers, which

said last mentioned act provided among other things that *"whenever a water power shall be created by reason of any dam erected or other improvements made on any of said rivers, such water power shall belong to the state subject to the future action of the legislature,"* whereby the state did appropriate to its own use and the use of its successors and assigns the water power of the Fox river created by dams to be erected in the progress of the work of improving said river; that one of rapids in said river around which it was necessary to secure slack water navigation by means of dams, locks and canals, and of which the water power to be created thereat was appropriated by the state, was commonly known as the Kaukauna Rapids and was so designated in said answer. That at the time the state began the work of improvement no person had the right to build a dam across said river and the state has never authorized any person or corporation to build and maintain a dam across said river at the point in question save the defendant Green Bay and Mississippi Canal Company and its grantors. That the state adopted a plan and system for the construction of a dam and canal at said Kaukauna Rapids, by which plan it was determined to build a low dam beginning on the south side near the head of the rapids extending down stream on or near the south bank of the river across lots 8, 7, 6 and onto lot 5 of said section 22, and thence extending at about a right angle with the south bank north across the river leaving an opening at the north end through which the whole water of the river could pass, and into which opening, during the period of construction, a guard-lock (so called) should for safety sake be placed, and thence further extending down the bed of the river to and in part near to and in part on the north bank to a certain point at which should be placed a lock proper (such lock proper being on the main land below the head of island number 3 and below the mouth of said middle channel of said river), leaving between such last mentioned extension of the dam and said north bank a channel sufficiently large to fully pass the ordinary flow of the river, and which dam, by the

aid of such lock proper, should uphold and sustain the waters of said river throughout the full extent of said dam at one and the same level, and also from the foot of said lock to construct with locks a canal on the said north bank extending down stream and into the river at the foot of the rapids, through which locks and canal boats could be passed. That prior to the fall of 1855 the state did construct and complete the said dam and canal in accordance with the plan adopted, and that said state and its grantees, partly prior to the fall of 1855 and partly in 1856, did acquire by purchase and otherwise lands for the location of said dam and canal thereon and for the utilization thereon of the water powers created by said dam and canal, and platted the lands acquired for the utilization of water powers into water power or mill lots, all of which were situated on the north bank of said river between said dam and canal on one side and the river on the other, and the greater number of which were below the head of island number 3, and did publish, declare and make known, among other things, that such water powers, to-wit, all the powers created by said dam and canal, had been taken and appropriated by the state under said acts of legislation to the use of the state and its grantees and were claimed to be their exclusive property. We quote the following from said cross complaint at page 90 of transcript: "The dam and canal in question were constructed for the most part by Morgan L. Martin under a contract made with the state in 1851, which work was continued by the said Martin after the work of improvement had been granted to the Fox and Wisconsin Improvement Company and were so constructed and finally completed under the act of the legislature of Wisconsin, approved August 8, 1848, and acts of the legislature subsequent thereto, *other than which there was no authority for building and maintaining same.*"

That on the 6th day of July, 1853, and by Chapter 98 of the Laws of Wisconsin for 1853, the state of Wisconsin incorporated the Fox and Wisconsin Improvement Company for the purpose of completing such im-

provement of said Fox and Wisconsin rivers and relieving the state of its indebtedness on account of the work theretofore done on the same and from liability on contracts not then executed, and thereby granted to said improvement company the works of improvement mentioned in said cross complaint, together with all and singular the rights of way, dams, locks, canals, water power and other appurtenances of said works; also all the rights possessed by the state of demanding and receiving tolls and rents for the same and all privileges of constructing said work and repairing the same and all other rights and privileges belonging to such improvement, to the same extent and in the same manner that the state then held or might exercise such rights by virtue of the acts referred to.

That among the property which so passed to and vested in said improvement company were the said dam, locks and canals at Kaukauna Rapids and the hydraulic powers furnished by said dam, which said dam and canal were then partly completed; that afterwards and pursuant to an act of the legislature of Wisconsin approved October 3, 1856, in order to secure the enlargement and immediate completion of the said improvement and for other purposes, said improvement company executed a deed of trust to three trustees of all the unsold lands granted to the state of Wisconsin to aid in such improvement and of all the works of improvement constructed or to be constructed on said rivers, and all and singular the rights of way, dam, locks, canals, water powers and other appurtenances of said works, and all rights, privileges and franchises belonging to said improvement, and all property of said company of whatever name and description, to secure certain of the bonds of said improvement company; that said deed of trust was afterwards foreclosed and the property covered thereby sold to a certain committee, and the parties represented by such committee formed the said Green Bay and Mississippi Canal Company under and pursuant to Chapter 289 of the Laws of Wisconsin for 1861, which canal company, by its articles of association, accepted the rights, powers,

privileges, franchises, capacities, immunities, exemptions and burdens granted by and conferred under and imposed by said last mentioned act and the acts amendatory thereof, and also received from the trustees in said trust deed, plaintiffs in the foreclosure action, by order of the court, wherein said trust deed was foreclosed, conveyance of the rights, franchises and property covered by and included in said trust deed, which conveyance was executed August 18, 1866. Thereafter said canal company entered into possession of all such property and the exercise of all such franchises and spent large sums of money in improving, preserving and operating said works of improvement, including said dam and canal at the Kaukauna Rapids and the water power connected therewith. That congress passed an act, approved July 7, 1870, whereby, among other things, it authorized the secretary of war to ascertain what sum in justice ought to be paid to the Green Bay and Mississippi Canal Company for all and singular its property and rights of property in said line of water communication, including its locks, dams, canals and franchises, or so much of the same as should, in the judgment of said secretary, be needed; that the legislature of Wisconsin, by act approved March 23, 1871, authorized said canal company to sell and dispose of its rights and property to the United States as contemplated by said act of congress; that pursuant to said act of congress a board of arbitrators was selected to appraise such property and appraised the same at $1,048,070; they also found that the amount of money realized from the sale of lands granted by congress to aid in the construction of such improvement and to be deducted from such actual value to be $723,070, leaving a balance of $325,000 to be paid to said canal company for all such property. They also appraised the water powers and lots necessary to the enjoyment of the same at $140,000, and certain personal property at the sum of $40,000; that the secretary of war made his report to congress that all of said property was of the value of $325,000; that the value of the water powers and lots was $140,000 and of the personal prop-

erty $40,000, and that said personal property and the water powers and lots necessary to the enjoyment of the same were not needed by the United States; that thereupon congress made an appropriation, approved January 10, 1872, of $145,000 for the purchase of the rights and property of said canal company reported by the secretary of war to be needed for the purpose of navigation, which sum was paid to said canal company September 18, 1872, whereupon said canal company conveyed to the United States certain of its franchises and property by deed, a copy of which is to be found at page 58 of transcript.

The property conveyed by said deed is described therein as follows:

"All and singular its property and rights of property in and to the line of water communication between the Wisconsin river aforesaid and the mouth of the Fox river, including its locks, dams, canals, and franchises, saving and excepting therefrom and reserving to the said party of the first part the following described property rights and portion of franchises which in the opinion of the secretary of war and of congress are not needed for public use, to-wit:

First: All of the personal property of the said company and particularly all such property described in the list or schedule attached to the report of said arbitrators and now on file in the office of the secretary of war, to which reference is here made, whether or not such property be appurtenant to said line of water communication;

Second: Also all that part of the franchises of said company, viz.: The water powers created by the dams and by the use of the surplus waters not required for the purpose of navigation, with the rights of protection and preservation appurtenant thereto and the lots, pieces or parcels of land necessary to the enjoyment of the same, and those required with reference to the same, all subject to the right to use the water for all purposes of navigation as the same is reserved in lease heretofore made by said company, a blank form of which attached to the said report of said arbitrators is now on file in the

office of the secretary of war and to which reference is here made, and subject also to all leases, grants and assignments made by said company, the said leases, etc., being also reserved therefrom."

That said canal company is the owner of and entitled to the exclusive use and control of the water power furnished by said dam across Fox river, subject only to the right of the United States to draw only so much water therefrom as is necessary to fill the canal on the north side of said river leading from the point above said dam to the river below said dam for the purposes of navigation; that the United States has the use of said dam, canal and embankments and of the waters therein for purposes of navigation only and that the said canal company has the right to the exclusive use of same and has title to and possession of the same for the purpose of using all surplus water drawn and to be drawn from said point above said dam over and above the amount necessary for use in navigation; that said dam and the canal on the north side of the river, etc., were built and have been maintained by the state of Wisconsin and its grantees *"under and by virtue of the said act of the legislature of Wisconsin approved August 8, 1848,* and other acts relating to said improvement and said grants and for the uses and purposes specified in said act and other acts relating to the completion of said improvement."

"That by the appropriation *under said act, approved August 8, 1848,* and the building and the maintaining of the dam, canal and embankment hereinbefore specified, the state of Wisconsin, the improvement company and the canal company acquired the easement in and to the entire river bed against lot 5 extending to the thread of the stream against the same, and in and to the entire banks of the same for a dam landing and site for an embankment to retain the water raised by such dam, *and also by such appropriation, building, maintaining, proclamation of right, purchase of lands and utilization of water power, acquired the easement to and exclusive ownership of all the hydraulic power created by said dam, extension thereof and canal, with the right of use of the same*

upon the lands which were as aforesaid acquired therefor, or upon such other lands acquired or to be acquired therefor as the said state and parties claiming under the state, including said canal company, might have selected 'or may select."

That, by virtue of the right so acquired by said canal company, it is the owner of all the water power created by the government dam in question and has the right to make exclusive use of the same at any point on its own lands where the same can be made available and particularly at points or places on said dam, including its extension to said lock opposite island number 3 and the middle of island number 4 where it was contemplated by the board of public works the same should be used.

III.

The third general subdivision of said answer or cross complaint states that it is a separate defense in bar and also a counter claim and sets up a certain judgment of the Supreme Court of Wisconsin, reported in Volume 70 of Wisconsin Reports at page 635, in a certain action brought by said canal company against said Kaukauna Water Power Company and others and alleged to have been based upon substantially the same facts as are stated in the second defense of said cross complaint, and claims that said judgment is conclusive aganist the defendants therein as to said canal company's title and ownership of the water power created by the government dam in question. The following quotation is made in said third subdivision of said cross complaint from said judgment: "It requires no argument to demonstrate that the water power reserved to the state by section 16 of the Act of 1848 was granted to the Fox and Wisconsin Improvement Company by chapter 98, Laws of 1853; that the same passed to the plaintiff by the purchase under foreclosure of the trust deed and mortgage and the conveyance thereof to it by the trustees and mortgagees therein, and that in its conveyance to the United States the plaintiff reserved to itself all of the surplus water power created by the improvement. We

conclude therefore that whatever rights the state took to the Kaukauna water power by the Act of 1848 (which is the absolute ownership of the whole thereof, if that is a valid act) is vested in the plaintiff."

IV.

The fourth subdivision of said cross complaint sets up a claim of right and title to certain water power by adverse user for more than twenty years. Said cross complaint concludes with the following prayer for judgment:

"First. Any decree to be entered in this action determining and adjudicating what share or proportion of the flow of said Fox river where the same passes Islands numbers 3 and 4 in township 21 north of range 18 east, is appurtenant and of right should be permitted to flow in the south, middle and north channels of said river respectively, shall declare and be made subject to the right of the defendant here answering to use all of the water power created by the said government dam on its own lands on the north side of said river or elsewhere as it shall see fit; and that the apportionment of the flow of the river so to be made shall be confined to such part of the river, if any, as shall not be so used and shall be permitted to flow in the channel of said river below said dam, and adjudging that this defendant may have such other judgment, order or relief in the premises as shall be just and equitable; and

Second. Adjudging that the plaintiffs and the Kaukauna Water Company pay to this defendant here answering its costs and disbursements incurred in this action." (Transcript, pp. 84-101.)

ANSWER OF KAUKAUNA WATER POWER COMPANY AND OTHERS TO CROSS COMPLAINT.

Said answer alleges that the original or first dam which was constructed across the Fox river at Kaukauna extended from bank to bank of said river and

that its north end abutted at its full height upon the north bank of said Fox river and so remained in use until about 1875, and that the government canal as originally constructed was cut through solid land from a point about 100 feet up stream from the northerly end of said original dam, passing the north end thereof and thence down stream, and was cut through and lay in solid earth for a distance down stream below the north end of said original dam about 100 feet; that the retaining wall which supports the south bank of said canal from below the lower or down stream side of the present dam was no part of said original dam as the same was originally constructed and that no part of said government canal as originally excavated lay in the bed of Fox river until it reached a point at least 100 feet down stream from the north abuttal of said original dam upon the north bank of said Fox river; that said dam was a complete structure by itself as originally constructed, ending at its said abuttal upon the north bank of said river and so remained until the building of the present dam by the United States in or about the year 1875; that said canal as originally constructed or excavated was only 100 feet in width at the top of the banks thereof and of sufficient depth for water crafts drawing about three feet of water, and that there was constructed and for a number of years after 1855 maintained at the head or mouth of said canal at a point about 50 to 75 feet up stream from the northerly abuttal of said original dam upon said north bank a guard-lock (so-called), which guard-lock was constructed with gates at both the upper and lower ends thereof for the purpose of regulating the flow of water into said canal and protecting said canal against accidents and unusual floods of water, and also for the purpose of excluding, in case of necessity, all water from said canal, which guard-lock was about 75 feet in length and about 25 feet in width on the inside thereof, and the floor or bottom thereof was only about 4 feet below the surface of the water in said canal above or up stream from said guard-lock and would not allow of and was not of sufficient size or capacity for the pas-

sage down the same of one-half of the flow of said river at an ordinary stage for hydraulic purposes in addition to water then necessary to be passed through said canal for the purposes of navigation. That from the time of the completion of said canal up to the time of the commencement of this suit *the amount of water necessary to be introduced into and carried down said canal for the purposes of navigation was only about 1,000 cubic feet per minute, while the whole flow of said river at an ordinary stage was and is about 150,000 cubic feet per minute.* That the said government canal, as the same was originally constructed and as the same remained in use for at least twenty years next thereafter, was not sufficient to admit of passing into or down the same one-half of the whole flow of said Fox river at an ordinary stage of water. That at the time of the commencement of this action and of the filing of said amended cross complaint the defendant Kaukauna Water Power Company was the owner of all the land bordering on the south side of the south channel of said Fox river from a point at least 1400 feet above the present government dam down stream along the rapids of said Fox river about a half a mile to slack water below said Kaukauna Rapids, and that there is a fall of thirty feet or more in said river from said dam down stream to slack water in each of the said channels, and the water of said river as it passes down said rapids is all susceptible of use by means of dams and otherwise on the lands of said Kaukauna Water Power Company for hydraulic purposes. That at the time of the commencement of this action and of the filing of said cross complaint the said Kaukauna Water Power Company was the owner in fee simple of all said island number 2, and also of undivided shares of the land bordering the several channels in said river upon islands number 1, 3 and 4. That in the north channel of said river, from the foot of the government dam down to the mouth of the middle channel over against island number 4, are rapids and a fall of at least 6 feet; that from the mouth of said middle channel down stream along the so-called north channel of said Fox river over

against island number 3 and thence down to slack water below said Kaukauna Rapids, are rapids and a fall of at least 25 feet, over which the water of said river passes, all of which is and always was susceptible of being improved on the land of said Kaukauna Water Power Company so as to create water power for hydraulic purposes then and now capable of being used upon the lands of said Kaukauna Water Power Company bordering said channels, which said water power was and is of the value of at least $100,000. That neither the state of Wisconsin nor the Fox and Wisconsin Improvement Company nor the Green Bay and Mississippi Canal Company ever acquired by said act of August 8, 1848, or otherwise, except by purchase from riparian owners, any right to or interest in the bed of Fox river or to any of the water or to the use of any of the water of said river, except for the purposes of navigation, from the present government dam down to slack water below said Kaukauna Rapids, and never had any power or authority under said act of August 8, 1848, or otherwise, except by purchase from the owners, to appropriate to their own use for private or hydraulic purposes any of the water of said river below or down stream from said government dam. That none of the water of said river except what is necessarily taken into said canal above said government dam for the purposes of navigation (being only a flow of about 1,000 cubic feet per minute), is or ever was necessary for navigation purposes below said dam, but that the whole flow of said river, except the small part thereof so stated to be necessary for the purposes of navigation, should, if used by said Green Bay and Mississippi Canal Company for private or hydraulic purposes, be used by it at said government dam and all of the water so used by it or its lessees should be returned to the bed of the stream immediately at the foot of said dam above the head of island number 4, so that the same may be distributed over the various channels of said river as and in the same proportions and to the same depth as the same was wont to run in the state of nature.

Denies that said Green Bay and Mississippi Canal Company or any other party has any lawful right to divert down the said government canal past the lands of the defendant Kaukauna Water Power Company any of the water of said river except for the purposes of navigation.

Alleges that the only water power which the Green Bay and Mississippi Canal Company became the owner of under the said act of the state of Wisconsin of August 8, 1848, was that which was created by and immediately at said original dam without the addition of any increase thereof by fall in the river below said dam.

Said answer denies that under the act of the state legislature of August 8, 1848, and the building and maintaining of said dam and canal, the said Green Bay and Mississippi Canal Company acquired the right to make exclusive use of the water power created by said dam at any point on its own lands where the same could be made available or at any point below said government dam.

Said answer denies each and every material allegation contained in the first counter claim of the cross complaint not specifically answered, admitted or denied by said answer.

II.

The answer of said defendant Kaukauna Water Power Company and others to the second counter claim contained in said cross complaint denies that the Supreme Court of Wisconsin, by its judgment in the action mentioned in said second counter claim, or by any other judgment or at any other time, ever decided that said Green Bay and Mississippi Canal Company had lawful right or authority to divert or carry water except for the purposes of navigation below or down stream from the said government dam, and alleges that said Supreme Court of the state of Wisconsin in the opinion and judgment mentioned in said second counter claim, did decide and adjudge as follows, viz.: "We do not here determine the relative rights of the plaintiff and other

riparian owners below the dam with respect to the use of the water which would run over the dam if not taken from the pond into the canal, nor do we consider whether there is any restriction upon the manner or place in which the water shall be returned to the river below the dam. We only hold that the plaintiff (Green Bay and Mississippi Canal Company) owns the surplus water power created by the dam and that defendants have no legal right, without the consent of the plaintiffs, to draw water from the pond with which to propel machinery." (Transcript, pp. 156-166.)

The answers of the defendants Henry Hewitt, Jr., and William P. Hewitt to said cross complaint are substantially the same as the answer of the defendant Kaukauna Water Power Company and others to said cross complaint. (Transcript, pp. 167-185.)

The reply of the plaintiffs in the original action to the counter claims contained in the cross complaint of the Green Bay and Mississippi Canal Company controverts the allegations and claims made in said cross complaint substantially the same as is done by the answers of the defendants Kaukauna Water Company and others.

Bill of exceptions extends from page 196 to page 532 of transcript.

ARGUMENT.

I.

The jurisdiction of this court to review the judgment of a State Court of last resort is given by Section 709, United States Revised Statutes, which confers such jurisdiction.

First. Where is drawn in question the validity of a statute of, or an authority exercised under, the United States;

Second. Where is drawn in question the validity of a statute of, or authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of United States; or

Third. Where any title, right, privilege or immunity is claimed under the Constitution, or any treaty, or

statute of, or commission held or authority exercised under, the United States.

In *Sayward v. Denny*, 158 U. S., 180, this court states certain propositions or rules, touching the question of its jurisdiction under said section 709, as being settled, viz.:

1. "That the certificate of the presiding judge of the state court, as to existence of grounds upon which our interposition might be successfully invoked, while always regarded with respect, cannot confer jurisdiction upon this court to re-examine the judgment below. *Powell v. Brunswick County*, 150 U. S., 433, 439, and cases cited."

2. "That the title, right, privilege or immunity must be specially set up or claimed at the proper time and in the proper way. *Miller v. Texas*, 153 U. S., 535; *Morrison v. Watson*, 154 U. S., 111, 115, and cases cited."

3. "That such claim cannot be recognized as properly made when made for the first time in a petition for rehearing after judgment. *Locher v. Schroeder*, 149 U. S., 580, 585, and cases cited."

4. "That the petition for the writ of error forms no part of the record upon which action is taken here. *Butler v. Gage*, 138 U. S., 52, and cases cited."

5. "Nor do the arguments of counsel, though the opinions of the state courts are now made such by rule. *Gibson v. Chouteau*, 8 Wall. 314; *Parmelee v. Lawrence*, 11 Wall. 36; *Gross v. U. S. Mortgage Co.*, 108 U. S., 477, 478; *United States v. Taylor*, 147 U. S. 695, 700."

6. "The right on which the party relies must have been called to the attention of the court, in some proper way, and the decision of the court must have been against the right claimed. *Hoyt v. Sheldon*, 1 Black, 518; *Maxwell v. Newbold*, 18 How. 511, 515."

7. "Or, at all events, it must appear from the record, by clear and necessary intendment, that the Federal question was directly involved so that the state court could not have given judgment without deciding it; that is, a definite issue as to the possession of the right must be distinctly deducible from the record before the state

court can be held to have disposed of such Federal question by its decision. *Powell v. Brunswick County*, 150 U. S., 433, 439."

The bare averment in specifications of error of the Federal question essential to the jurisdiction of this court is not sufficient. Grounds for such averment must appear from the record.

Hamblin v. Western Land Co., 147 U. S., 531;
Clarke v. McDade, 165 U. S., 168, 172.

Tested by the foregoing rules and decisions the record proper herein does not disclose that any Federal question essential to the jurisdiction of this court was specially set up or claimed in the state court of last resort or presented to and decided by such court.

II.

The only title, right or privilege specially set up or claimed in the state court by the plaintiff in error as appears by the record proper and especially by the cross complaint, is to certain water powers along the line of water communication between the Wisconsin river and the mouth of the Fox river created by the dams and other works of improvement, including those at the Kaukauna Rapids.

(a) Such title, right or privilege, as so specially set up and claimed was derived wholly and exclusively from the State of Wisconsin.

The cross complaint of plaintiff in error alleges, at page 90 of Transcript, that the dam and canal in question "were constructed and finally completed under the "act of the legislature of Wisconsin, approved Aug. 8, "1848, and acts of the legislature subsequent thereto, *"other than which there was no authority for building and "maintaining same."*

Again, it is alleged at page 96 of Transcript as follows:

"That said dam and the canal on the north side of the river and said embankments on lots 5, 6, 7 and 8

were built and have been maintained by the State of Wisconsin and the Fox and Wisconsin Improvement Company and its trustees, and this defendant and the United States, since the time of the building of the same above specified, commenced in 1851 and completed in or about 1855 *under and by virtue of the said Act of the Legislature of Wisconsin approved August 8, 1848*, and other acts relating to said improvement and said grants, and for the uses and purposes specified in said act and other acts relating to the completion of said improvement."

Again it is alleged in said cross complaint, at page 98 of Transcript, as follows: "That by the appropriation "under said act approved August 8, 1848, and the build- "ing and the maintaining of the dam, canal and embank- "ment hereinbefore specified, the State of Wisconsin and "the Fox and Wisconsin Improvement Company and "the Green Bay and Mississippi Canal Company ac- "quired * * * * ; and also by such appropriation, "building, maintaining, proclamation of right, purchase "of lands and utilization of water power, acquired the "easement to and exclusive ownership of all the hy- "draulic power created by said dam, extension thereof "and canal, with the right of use of the same upon the "lands which were as aforesaid acquired therefor, or "upon such other lands acquired or to be acquired there- "for as the said State and parties claiming under the "State, including this defendant, might have selected or "may select."

These allegations show conclusively that the title, right or privilege to the water powers in question specially set up or claimed by the plaintiff in error was derived wholly from the State of Wisconsin.

(b) There are only three acts of Congress set up or mentioned in the whole record.

The first of these is entitled "An Act to grant a cer- "tain Quantity of Land to aid in the Improvement of "the Fox and Wisconsin Rivers, and to connect the same "by a canal, in the Territory of Wisconsin;" and was approved August 8, 1846. It granted to the State of Wisconsin on its admission into the Union for the purpose of improving the navigation of the Fox and Wis-

consin Rivers, in the Territory of Wisconsin, and of constructing the canal to unite the said rivers at or near the portage, a certain quantity of land, fixed a minimum price for the lands and provided that they should not be conveyed or disposed of by the State, except as the improvement progressed, also fixed times for the commencement and completion of the improvement, and also provided that the said rivers, when improved, and the said canal, when finished, should be and forever remain a public highway for the use of the government of the United States, etc. Such was the full scope of the act. It nowhere suggested a plan for the improvement or reserved any right to or power or authority over the same, except that it should be a free highway for the use of the United States.

The second of these acts of congress is entitled "An "Act for the improvement of water communication be- "tween the Mississippi river and Lake Michigan by way "of the Wisconsin and Fox rivers," and was approved July 7, 1870. It authorized the secretary of war to ascertain the sum which in justice ought to be paid to the Green Bay and Mississippi Canal Company as an equivalent for the transfer of all and singular its property and rights of property in and to the line of water communication between the Wisconsin river and the mouth of the Fox river, including its locks, dams, canals and franchises, or so much of the same as should in the judgment of said secretary be needed, and to that end authorized the appointment of a board of arbitrators.

The last of said acts of congress was entitled "An "Act making appropriations for the repair, preservation "and completion of certain public works on rivers and "harbors, and for other purposes," and was approved June 10, 1872. It appropriated $145,000 for payment to the Green Bay and Mississippi Canal Company for so much of its property mentioned in the act last referred to as had been reported by the secretary of war to be needed. Beyond this it had no relation to the questions under consideration.

It is perfectly clear that the plaintiff in error did not

derive any title, right or privilege to the water powers in question under either of these acts.

(c) The plaintiff in error claims in its third and fourth assignments of error (Transcript, pp. 8 and 9) that in the deed of the Green Bay and Mississippi Canal Company to the United States, dated September 18, 1872 (Transcript, pp. 58-61), and by a certain reservation therein contained the United States granted to said plaintiff in error all the water powers along the line of water communication between the Wisconsin river and the mouth of the Fox river created by the dams or other works of improvement, and an easement in the line of water communication, its locks, dams and canals for the protection and preservation of said water powers, which reservation and grant were duly made in proceedings under and duly taken and had pursuant to said Acts of Congress and certain acts of the legislature of Wisconsin mentioned in said cross complaint.

The only shadow of support we find in the record for this absurd claim is the first conclusion of law found by the Superior Court of Milwaukee County upon the trial of this cause. We quote such conclusion:

"And as conclusions of law I find that under the deed of Sept. 18, 1872, the United States are bound to maintain the dam and canal so as to furnish to the Green Bay and Mississippi Canal Company all the surplus water from said pond not required for navigation at such points on said canal as said canal company should desire to use the same."

Said deed in terms conveys the entire property of the grantor, including its locks, dams, canals and franchises, "saving and excepting therefrom and reserving to the said party of the first part":

1st. All of the personal property of the grantor; and

2nd. The water powers created by the dams and by the use of the surplus waters not required for the purpose of navigation, with the right of protection and preservation appurtenant thereto, and the lots, pieces or parcels of land necessary to the enjoyment of the same and those acquired with reference to the same, all sub-

ject to the right to use the water for all purposes of navigation, etc.

The property, water powers and rights so saved, excepted and reserved were then in being, part and parcel of the property of the grantor and severable therefrom.

A *reservation* is always of some new right not *in esse*, in substance at the making of the grant.

An *exception* must be a part of what is included in the grant and be to be taken, in substance out of that.

Washburn Real. Prop. (5th Ed.) p. 461;
Amer. & Eng. Enc. of L. (1st Ed.) Vol. 5, pp. 455-6.
Stockwell vs. Couillard, 129 Mass., 231, 233.

The distinction between an exception and a reservation is stated in Shep. Touch., p. 80, as follows: "A reservation is a clause in a deed, whereby the grantor doth reserve some *new thing* to himself out of that which he granted before. This doth differ from an exception, which is ever a part of the thing granted, and of a thing *in esse* at the time; but this is of a thing newly created or reserved out of a thing demised that was not *in esse* before."

Whether a particular provision is an exception or a reservation does not depend upon the use of the word "reserving" or "excepting" but upon the nature and effect of the provision itself.

Martin vs. Cook, (Mich.) 60 N. W. Rep., 679, 680.
Rich vs. Zeilsdorff, 22 Wis., 544.
Strasson vs. Montgomery, 32 Wis., 52, 58.
Green Bay & Mississippi Canal Co. vs. Hewitt, 66 Wis., 461-466.

It seems clear that the grant in this case contained an exception and not a reservation. The thing reserved is a part of that which is described as granted generally; it consists of property, rights and franchises which are

severable therefrom and may be enjoyed separately. Therefore, the language must have constituted an exception, as it applied to property, rights and franchise *in esse* at the time of the grant and not to those which were to spring up *in futuro*.

Tested by the apparent intention of the parties the language used constitutes an exception and not a reservation. The Act of Congress of July 7, 1870, pursuant to which and to proceedings authorized thereby the deed in question was given, only contemplated that the United States should take and pay for so much of the property, rights and franchises of the plaintiff in error as in the judgment of the Secretary of War should be needed. It did not authorize the United States to make any grants in favor of the plaintiff in error.

We must therefore conclude that the deed in question contains no implied grant by reservation from the grantee to the grantor.

(d) The fifth assignment of error (Transcript, p. 10), proceeds upon an assumption of facts which do not exist and are not shown by the record to exist, viz.: that the water powers and easement in question were acquired by the plaintiff in error under proceedings had pursuant to the said Act of Congress, approved July 7, 1870, and presumably by a grant from the United States for a valuable consideration, wherein it warranted the title. We have already shown that there was no such grant, and none was authorized by the said Act of Congress referred to. If the plaintiff in error did not have title to said water powers and the incidental right to protect and preserve the same prior to passage of said Act of July 7, 1870, it never has had such title.

(e) Plaintiff in error, by its sixth assignment of errors, claims that its title, right and privilege to the water powers and easement in aid thereof in controversy were considered by this Court in the case of Kaukauna Water Power Company and others as plaintiffs in error, against the Green Bay and Mississippi Canal Company as defendant in error, reported in Volume 142 of the United States Reports, at pages 254, etc., and upon the

same facts the said title, right and privilege were sustained by this court.

The water powers in controversy in the suit at bar *are not the same* as those which were in controversy in the suit above mentioned.

The writ of error in the said suit, reported in 142 U. S., 254, brought up for review the judgment of the Supreme Court of Wisconsin in Green Bay and Mississippi Canal Co. vs. Kaukauna Water Power Co. and others, reported in Volume 70 of Wisconsin Reports, at page 635, and is the same judgment or opinion referred to in the third subdivision of the cross complaint herein. (Transcript, p. 100.) The dam considered in the said judgment of Wisconsin Supreme Court extended directly from the south to the north bank of the river and not down the river to first lock in canal as alleged in the cross complaint herein, and the government canal, so called, extended from the pond raised by said dam down and upon the north side of the river, and was constructed with locks and used for purposes of navigation. (See 70 Wis., 640, 641.) The Wisconsin Supreme Court adjudged in the case referred to, 70 Wis., at page 656, subdivision 5 of the opinion, that the plaintiff there (plaintiff in error here), was the legal owner of the *water power created by such dam* over and above what was required for navigation, and further adjudged, page 657, as follows:

"We do not here determine the relative rights of the "*plaintiff* and *other riperian owners below the dam*, in re- "spect to the use of the water, which would run over the "dam if not taken from the pond into the canal; nor do "we consider whether there is any restriction upon the "manner or place in which the water shall be returned "to the river below the dam. We only hold that the "plaintiff owns the surplus water-power created by the "dam, and that the defendants have no legal right, with- "out the consent of the plaintiff, to draw water from "the pond with which to propel machinery."

This makes it perfectly clear that the Wisconsin Supreme Court did not in that case determine any water

power or other rights *below the dam*, which are the only rights in controversy in the present suit.

The United States Supreme Court simply *affirmed the decree of the Supreme Court of Wisconsin* (See 142, U. S., 282), and therefore did not adjudicate any rights beyond what had been adjudicated by the decree affirmed.

III.

We will consider the seventh, eighth, ninth and tenth assignments of error (Transcript, pp. 11 and 12), together. In substance such assignments present the following proposition, viz.: that the Supreme Court of Wisconsin by its said judgment had so construed, interpreted and enforced the said acts of Congress and the said act of the legislature of August 8, 1848, in reference to the said water powers and easement in aid thereof in controversy, that it had deprived the plaintiff in error of its said property without due process of law and contrary to the provisions of the Constitution of the United States and the Fourteenth Amendment thereof.

(a) It is asserted in these assignments and elsewhere by the plaintiff in error that the state was acting for the United States and as its agent in making the improvements in question. It is true that the United States granted to the state, by act of Congress, approved August 8, 1848, certain lands for the purpose of improving the navigation of the Fox and Wisconsin rivers upon certain conditions subsequent. This act in no sense made the state the agent or the trustee of the United States. If the state had failed to keep and perform the conditions subsequent of the grant, then the only remedy of the United States would have been to forfeit the grant. Had the state acted as the agent of the United States, then the title to the improvement would have been in the United States and the state would have been without authority to grant the improvement and the property and rights connected therewith to the Fox and

Wisconsin Improvement Company or the Green Bay and Mississippi Canal Company, without the consent of the United States thereto. Further, there would have been no necessity for a sale or conveyance of the improvement by the state to the United States as the title to the improvement would have been in the United States.

(b) The judgment of the state court did not hold that the water powers in question, being those below the dam, were taken either by the United States or the state, for either a public or a private purpose. *It only held that such water powers were not taken by anyone or for any purpose*, and that they belonged to the riparian owners upon the river and its different channels, whose respective rights to appropriate and use such water powers were determined by the law of the land relating thereto.

(c) The record proper shows that the plaintiff in error only claimed its right to the said water powers and easement in controversy in the state court, under the said act of the legislature of Wisconsin, approved August 8, 1848, and acts of said legislature subsequent thereto, none of which were claimed to be repugnant to the Constitution or laws of the United States.

The said cross complaint alleges (Transcript, p. 86) that by the legislative act approved August 8, 1848, providing among other things that "whenever a water power shall be created by reason of any dam erected or other improvements made on any of said rivers, such water powers shall belong to the state subject to the future action of the legislature," the said state of Wisconsin did appropriate to its own use and the use of its successors and assigns the water power of the said Fox River created by the dams to be erected in the progress of the work of improving said river. It also alleges (Transcript, p. 90) that the dam and canal in question were constructed and finally completed under the act of the legislature of Wisconsin approved August 8, 1848, and acts of the legislature subsequent thereto, *other than which*

there was no authority for building and maintaining same. It also alleges (Transcript, p. 98) that the state, the improvement company and the Green Bay and Mississippi Canal Company, by the appropriation under said act of August 8, 1848, and also by the said building, maintaining, proclamation of right, purchase of lands and utilization of water power, acquired the easement to an exclusive ownership of all the hydraulic power created by said dam, extension thereof and canal, with the right of use of the same upon the lands alleged to have been acquired therefor, or upon such other lands acquired or to be acquired therefor as the state and parties claiming under it, including said plaintiff in error, might have selected or may select.

These allegations left to the said state court only the construction of state statutes and the rights acquired thereunder in determining the controversy before it. The Supreme Court of Wisconsin in its opinion (Transcript, p. 542) states that the *principal question involved was the right of the Green Bay and Mississippi Canal Company to divert the water of the stream for water power by means of the canal and its sluice-ways from the riparian proprietors of water power below the dam.*

None of the acts of Congress hereinbefore referred to are mentioned in the opinion of the state Supreme Court with this exception: that the first sentence of said opinion (Transcript, p. 540) is as follows: "In 1846 Congress granted to the State of Wisconsin, when it should become a state, certain lands to be used in improving the navigation of the Fox and Wisconsin Rivers." None of said acts of Congress are construed in such opinion. The only statutes construed are those of the state, and especially the state act of August 8, 1848. The court expressly says in its opinion (Transcript, p. 544) that the statute which vested the title of this water power in the state was a part of Section 16, of said Act of 1848, in these words: "Whenever a water power shall be created "by reason of any dam erected or other improvement "made, such water power shall belong to the State."

This shows conclusively that the State Court in reaching its judgment did not consider any of the Acts of Congress mentioned, but only construed and gave effect to the State statute.

(d) The eleventh assignment of error when analyzed seems to resolve itself into this, viz: that the Supreme Court of Wisconsin by its judgment deprived the plaintiff in error of certain property rights without having jurisdiction so to decide.

The opinion of Chief Justice Cassoday of the Wisconsin Supreme Court upon the motion in that court of the plaintiff in error here to vacate the order granted March 10, 1896, dismissing its appeal to that court and to reinstate the appeal, gives a very lucid answer to this proposition of error. Such opinion is found at page 593 of Transcript.

Again, upon the trial herein in the Superior Court for Milwaukee County the parties hereto, including the plaintiff in error, agreed in open court as follows:

"The parties agree that by the fair result of the testi-"mony in the case the natural flow of the river in the "different channels was as follows: 43-200 in the south "channel, 62-200 in the middle channel and 92-200 in "the north channel, provided that this agreement shall "be subject to whatever decision the court may make "upon the issues raised by the answer and cross-com-"plaint of the Green Bay and Mississippi Canal Company "and the several answers thereto." (Transcript, p. 492.)

This agreement disposed of one of the issues of fact in the action and authorized the adjudication prayed for in the first subdivision of the prayer for judgment in the complaint in the original action (Transcript, p. 121), viz.: that the share or proportion *of the entire natural flow of said Fox river* named in the agreement as to said channels respectively, is appurtenant to and *of right* should be permitted to flow in the south, middle and north channels of said river, respectively, subject to whatever decision the court might make upon the issues raised by the answer and cross complaint of the plaintiff in error

and the several answers thereto. In the face of this agreement the plaintiff in error cannot now be heard to question the jurisdiction of the State Court to make the decision which it did make as to the flow of the river in its several channels.

The writ of error should be dismissed.

JOHN T. FISH,
ALFRED L. CARY,
Counsel for said Defendants in Error.

IN SUPREME COURT OF THE UNITED STATES.

October Term, 1897.

No. 190.

THE GREEN BAY AND MISSISSIPPI CANAL COMPANY, PLAINTIFF IN ERROR,

vs.

THE PATTEN PAPER COMPANY (Limited), THE UNION PULP COMPANY AND THE FOX RIVER PULP AND PAPER COMPANY, KAUKAUNA WATER POWER COMPANY, HENRY HEWITT, JR., W. P. HEWITT, ET AL., DEFENDANTS IN ERROR.

BRIEF OF DAVID S. ORDWAY, ON BEHALF OF DEFENDANTS IN ERROR, KAUKAUNA WATER POWER COMPANY, HENRY HEWITT, JR., AND WILLIAM P. HEWITT, ON MOTION TO DISMISS.

May it Please Your Honors—

This action was originally commenced in the State Court of the State of Wisconsin by the Patten Paper Company (Limited), Union Pulp Company, and Fox River Pulp and Paper Company against the Kaukauna Water Power Company, The Green Bay and Mississippi Canal Company, Henry Hewitt, Jr., and William P. Hewitt, impleaded with others, for the purpose of, First, Determining and adjudicating what share or proportion of the entire natural flow of said Fox river is appurtenant to and of right should be permitted to flow in the south, middle and north channels of said river respectively.

Second, Restraining the defendant, the Kaukauna Water Power Company, and all others claiming under it, etc., from drawing from said Fox river, above the head of Island No. 4, and passing around and below the head of said Island No. 4, and so that the same should not come into the middle channel of said

river and into the mill pond of the plaintiffs in said action, called the Meade & Edwards water power, more water, flow of said river, than the one-sixth part thereof, or more than the amount which by nature was appurtenant to and flowed in said south channel of said river. And

Third, That the Kaukauna Water Power Company pay to the plaintiffs in said action the costs thereof. (See prayer for judgment, page 121 of the printed record.)

To this complaint certain of the defendants (not including, however, the Green Bay and Mississippi Canal Co.) demurred on various grounds, among others that a court of equity had no jurisdiction at common law to partition or apportion among respective owners of the various channels the waters thereof when unimproved by dams; and also on the ground of misjoinder of causes of action. The decision upon these demurrers by the trial court went to the Supreme Court of the state, was there disposed of, and an opinion filed, which is returned with this writ of error and is found on pages 40 to 47, inclusive, of the printed record herein, but is not deemed by us material on this motion.

After the remittitur from the Supreme Court was filed in the court below, all of the defendants in said original action who were substantially interested in the question of the apportionment of water answered the said original complaint, up to which time the Green Bay and Mississippi Canal Company had not appeared in the action; but after the record was returned to the trial court, and while testimony was being taken upon the issues joined as to the division of water, said company, plaintiff in error herein, determined to contest in said action the right of any and all parties (except itself) to the use for hydraulic purposes of any of the water of the said Fox river at the Kaukauna rapids, and thereupon afterwards, as is hereinafter stated, interposed its said broad claim by way of cross bill.

The Fox is a public, meandered river, navigable, in a state of nature, from Green Bay to Lake Winnebago, except over certain rapids therein, one of which is found at Kaukauna, the fall of the river at that point being over forty feet within a distance of about one mile. The bed of said river for such entire distance was and is occupied by rapids, and was and is composed of rocks and bowlders, the water passing over, among and down the same very swiftly, and most of said distance at a depth of from one to two feet only down all of the different channels of said river, turning and winding from point to point between and over such rocks and bowlders, creating whirlpools and eddies, with a current so swift and strong that it was never possible for water-craft of any kind to pass up and

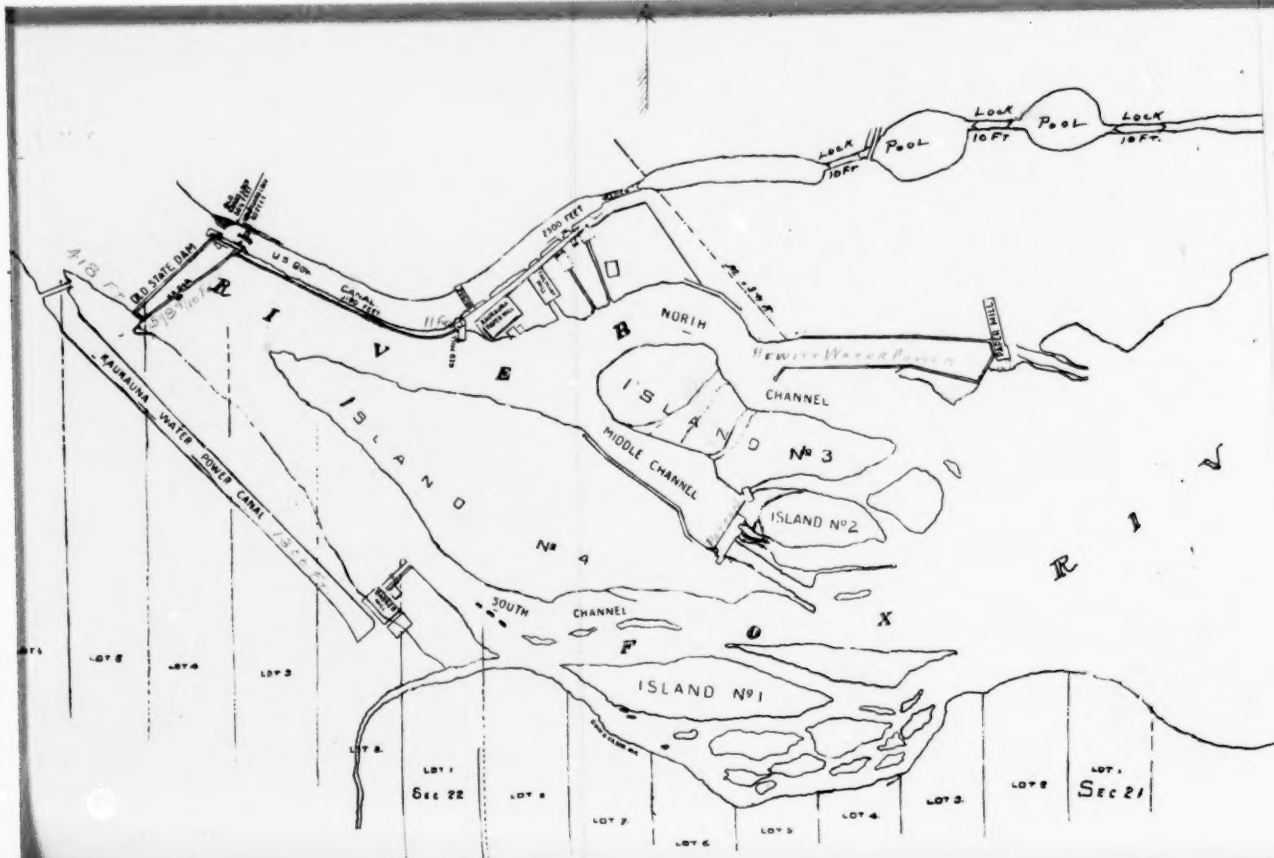
down the same with safety; and that from the earliest time, until the completion of the government canal mentioned in this record, all commodities or merchandise transported up or down said Fox river were passed around said entire rapids, over the so-called Portage from above said rapids down into slack water below the same, which said Portage was one of the carrying places mentioned in Article 4 of the ordinance for the government of the territory of the United States northwest of the Ohio river, of July 13th, A. D. 1787, and that in fact said river was not navigable, in a state of nature, for said entire distance occupied by said Kaukauna rapids.

The owners of the banks of navigable rivers in the State of Wisconsin are held, by the decisions of its Supreme Court, to be the owners of the beds of such rivers, and where one owns but one side or bank of the river he is the owner in fee of the bed thereof to the center or thread of such stream over against the banks thereof which belong to him, and is also the owner of and entitled to use the flow of such navigable river over the same to the same extent and in the same manner as if such stream was not navigable, subject only to the rights of the public for purposes of navigation.

The natural flow of the Fox river at Kaukauna rapids, at an ordinary low stage of water, is about 150,000 cubic feet per minute, of which not more than 1000 cubic feet per minute is used through the government canal or necessary for navigation in its season, and navigation does not ordinarily extend over six or seven months in each year, and that at an ordinary low stage of water the flow of the river down said rapids is sufficient to create about 300 horse power per foot fall, the rent or annual use of which is worth not less than five dollars per horse power.

At said Kaukauna rapids the river is divided into several separate channels by four islands, each of which was surveyed by the United States at the time of the government survey, and the contents or area of each of which was returned with the survey and plat of said township to the general land office of the United States. That such islands were numbered 1, 2, 3 and 4 in such survey; and were returned as containing, No. 1, about six acres; No. 2, about two acres; No. 3, about ten acres, and No. 4, about twenty-two acres of land; and that each of said islands was in 1835 sold by the United States as containing said amounts of land and conveyed to a private or individual owner by government patent in the usual form without exception therein or reservation. That the upper island is No. 4, which is about 135 rods long with the stream, and lays next to the south bank of the river, and extends about 70 rods up the stream above the head of Island No. 3.

That Island No. 3 lies partly between Island No. 4 and the north bank of the river, and is about 115 rods long with the stream, and extends about fifty rods below the foot of Island No. 4. That Island No. 2 lies south of the lower end of Island No. 3, and Island No. 1 lays south of Island No. 2 and the foot of Island No. 4, and between that and the south bank. The location of said islands, and the course of the various channels around the same, is shown by the outline map here following:


LOCK
10 Ft
POOL
LOCK
10 Ft
POOL
LOCK
10 Ft
OLD STATE DAM
U.S. GOV. CANAL
1300 FEET
RIVER
NORTH
CHANNEL
ISLAND No 3
MIDDLE CHANNEL
ISLAND No 2
ISLAND No 4
SOUTH CHANNEL
FOX
RIVER
ISLAND No 1
KAUKAUNA WATER POWER CANAL
LOT 1
LOT 2
LOT 3
LOT 4
LOT 5
LOT 6
LOT 7
LOT 8
LOT 1
SEC 22
LOT 1
SEC 21

The river at that point runs down stream about in an easterly course, and the government canal is shown on the northerly side of said map, extending from its up-stream opening or mouth, above the government dam, down stream past said entire rapids.

The plaintiffs in the original action were owners or lessees of mill sites and manufacturing establishments upon a water power created by a dam in the middle channel of said river between islands No. 3 and 4; the plaintiff in error, the Green Bay and Mississippi Canal Company, claims to be the owner in fee of the north bank of the river from the government or state dam, as shown upon the map, down stream about 1,180 feet, to the up-stream or southerly line of Private Claim No. 1, at the point marked upon the map "Red Mill," and is in fact the owner of the undivided half of the north bank of the north channel, and thence back to the government canal, from the said Red Mill down stream about eleven or twelve hundred feet. The other undivided half of which said last mentioned parcel is owned in fee by the defendants in error, Henry Hewitt, Jr., and William P. Hewitt; who also own an undivided half of the head of Island No. 3, and south bank of the north channel for several hundred feet down stream from the head of said Island No. 3.

The fall in the bed of the river from the foot of the government dam down to the Red Mill is about seven or eight feet, and from the Red Mill down to the down-stream line of the plaintiff in error and said Hewitts, about ten or twelve feet. Said river at Kaukauna rapids, where it is so divided into different channels by said islands, was wont, and by nature did flow and pass as follows: $^{95}/_{200}$ thereof through the north channel and north of Island No. 3; $^{43}/_{200}$ thereof through the south channel and south of Island No. 4, and $^{62}/_{200}$ thereof through the middle channel and between Islands No. 3 and 4.

The defendant in error, Kaukauna Water Power Company, had, prior to the commencement of this action, constructed a water power canal on the south side of said river opening out into the pond created by the government dam, and extending down stream along the south bank of said south channel about thirteen hundred feet, and were drawing water therefrom at the time of and before the commencement of this original action, for hydraulic purposes, in excess, as was claimed in and by said original complaint, of their water rights, and to the injury of the said plaintiff's water-power rights upon said middle channel.

The defendant in error, Kaukauna Water Power Company, is the owner of the south bank of said south channel and river, from above the government dam down stream to slack water

below the rapids, and is also the owner of an undivided part of all of the banks of all of said islands except Island No. 2, of which said Island No. 2 it is sole owner.

The plaintiff in error is also owner of an undivided part of the banks of said islands Nos. 1, 3 and 4, and the remaining defendants in error are owners of or otherwise interested in the flow of said river down some of said various channels below the head of Island No. 3. At the time of the commencement of said original action the plaintiff in error was lessor of and furnishing water to other of said defendants in error, drawn from the government canal and discharged into the river on the north side of the north channel from twelve hundred to two thousand feet down stream from the government dam, which water so drawn was taken out of the river above the dam through said government canal and diverted from the bed of the river and from the land of the said defendants in error, Hewitt and Kaukauna Water Power Company, and discharged again into the river at a point some two thousand feet down stream from said government dam, and below the land of said last named defendants in error.

Under this condition of things the plaintiff in error, Green Bay and Mississippi Canal Company, answered the original complaint of the plaintiffs and by way of cross bill (see stipulation, pages 61 and 62 of record), denied, *inter alia*, that the said plaintiffs in the original action, or any of said defendants in error, had any absolute right to the flow of any of the water of the river, and asserting in its said cross complaint that under the said canal law of the State of Wisconsin of August 8th, 1848, it was the owner of the right to use all of the water of said river down through said government canal or elsewhere for hydraulic purposes, except such as was necessary for navigation, and to return the same into said river at such point down stream below the lands of said defendants in error as to it seemed meet and proper. This broad right was claimed in its said amended cross complaint (see pages 66, 67, 68, 69 and 70 of the printed record) under the said canal law of the state of Wisconsin and particularly under the provisions of Sections 15 and 16 thereof, which sections are in words following, to-wit:

"Sec. 15. In the construction of such improvements the said board shall have power to enter on, to take possession of and use all lands water and materials, the appropriation of which for the use of such works of improvement shall in their judgment be necessary.

"Sec. 16. When any land waters or materials appropriated

by the board to the use of said improvements shall belong to the state such lands waters or materials and so much of the adjoining land as may be valuable for hydraulic or commercial purposes shall be absolutely reserved to the state, and whenever a water power shall be created by reason of any dam erected or other improvements made on any of said rivers such water power shall belong to the state subject to future action of the legislature."

The said plaintiffs in error in their said cross complaint, (see page 70 of the printed record) asserted its said claim to the use of all of the water of said river in the following language:

"The dam and canal in question were constructed for the most part by Morgan L. Martin under a contract made with the state in 1851, which work was continued by said Martin after the work of improvement had been granted to the Fox and Wisconsin Improvement Company, and were so constructed and finally completed under the act of the legislature of Wisconsin, approved August 8th, 1848, and acts of the legislature subsequent thereto, other than which there was no authority for building and maintaining same."

Said plaintiff in error also, in its said cross complaint, (foot of page 68 of record) set up and claimed that it was, by purchase and conveyance, the owner in fee of the north bank of the river from above said government dam down stream some twelve hundred feet to the up stream or southerly line of Private Claim No. One, at about the point marked on said map "Red Mill," and claimed in its said cross complaint, and upon the trial of said cross action, the right to take out of the bed of said stream and of said north channel, and down said government canal, for hydraulic purposes, what it was pleased to term "its half of the water of said north channel," and to discharge the same, as it had theretofore been discharging the same, through the mills and factories of its tenants, upon the land between said government canal and said north channel, as shown upon the said map above referred to, thus claiming the right, as owner of the north bank, to divert from the land of the Kaukauna Water Power Company, defendant in error, lying between the government dam and the head of Island No. 4, and from the north channel of said river, from the head of Island No. 4 down stream, the half of the water of the river, leaving to the defendants in error only one-half of the water running in said north channel as the same ran in a state of nature.

The defendants in error, plaintiffs in said original action, also

the Kaukauna Water Power Company and those claiming under it, and also Henry Hewitt, Jr., and William P. Hewitt, answered said cross complaint of the plaintiff in error, denying generally the broad claim of the plaintiff in error set up under the said canal law of 1848 to the use of the entire water of the river except such as was necessary for navigation, and asserting their individual rights to the use of the water of said river and to the flow of the same over their lands respectively as it passed down stream from said government dam, and alleged that none of the water of said Fox river, except what was necsarily taken into said canal above said government dam for the purposes of navigation, was ever necessary for such purposes, but that the whole flow of said river, except such small part thereof so necessary for purposes of navigation, should, if used by the plaintiff in error for private or hydraulic purposes, be used by it at said government dam, and that all the water so used by it or its lessees for hydraulic purposes should be returned to the bed of said river immediately at the foot of said dam, so that the same, and in such manner that the same, might be distributed over and passed down the bed and the various channels of said river as, and in the same proportions and to the same depth substantially in each as the same was wont to run in a state of nature. (See page 181 of printed record.)

The defendants in error, Kaukauna Water Power Company and said Hewitts, also set up and claimed in said State Courts that the said plaintiff in error, Green Bay and Mississippi Canal Company, had no lawful right at the common law, to divert from the north channel of said river and down the government canal, for hydraulic purposes, any of the water of said river returning the same to the stream below the lands of said defendants in error. (See top of page 160, and middle of page 161 of record.)

The defendants in error claimed generally in their pleadings, and throughout the trial in the State Courts, that the use of water and of the fall in the river below or down stream from said dam for hydraulic purposes, by the plaintiff in error, or by the State of Wisconsin, its predecessor in title, was not necessary for purposes of navigation within the true intent and meaning of Section 15 (above quoted) of said canal law of the State, of August 8th, 1848, and the highest court of the State, in its final determination of this action, so held and decided, thus giving construction to a statute of the State against the contention of the plaintiff in error.

By a former decision, between the plaintiff in error, Green Bay and Mississippi Canal Company, and the Kaukauna Water Power Company and others, referred to in this record,

and decided by the Supreme Court of Wisconsin February 28th, 1888—70 Wis., page 635—which decision was affirmed by the Supreme Court of the United States December 21st, 1891—142 U. S., 254—it was held that the provisions of the said canal law of Wisconsin of August 8th, 1848, applied to all water power created at the said government dam, and the Kaukauna Water Power Company, and all parties claiming under it, were restrained from drawing water from the pond created by said dam; but the rights of the respective riparian owners below the dam were not passed upon or considered; the Supreme Court of Wisconsin, with reference thereto, using this language (70 Wis., page 557): "We do not here determine the relative rights of the plaintiff (Green Bay and Mississippi Canal Company) and other riparian owners below the dam in respect to the use of the water which would run over the dam if not taken from the pond into the canal; nor do we consider whether there is any restriction upon the manner or place in which the water shall be returned to the river below the dam. We only hold that the plaintiff (Green Bay and Mississippi Canal Co.) owns the surplus water power created by the dam, and that the defendants have no legal right, without the consent of the plaintiff, to draw water from the pond with which to propel machinery." (See also the same quotation in the answers of said defendants in error to the cross complaint, pages 166, 175 and 185 of the printed record.)

The plaintiff in error, Green Bay and Mississippi Canal Company, by its said cross complaint, injected also in this original action its claim, as riparian owner of the north bank of the north channel from the government dam down stream so far as its claimed ownership thereof extended, to divert and take down through said government canal on the north side of the river at least one-half of the water due to said north channel, and to discharge the same again into said north channel at points opposite to and down stream from the head of said Island No. 3, thus diverting from the land of the defendants in error, the Kaukauna Water Power Company and said Hewitts, at least one-half of the water due to said north channel, and thus destroying the value of their said natural water powers.

Those claims, to-wit, under the canal law and at the common law, in all their different phases, were presented by said Green Bay and Mississippi Canal Company to the said State Courts, and tried and decided against without, as we think, the presentation of any federal question whatever. This, I think, will sufficiently appear from a consideration of the judgments rendered in the State Courts, and of the opinions of the Supreme Court, which are found in this record, and which I print here for greater convenience.

Copy of first judgment of the trial court giving the Canal Company substantially all it asked for in its cross complaint:

SUPERIOR COURT, MILWAUKEE COUNTY.

PATTEN PAPER COMPANY (Limited), and UNION PULP COMPANY, and FOX RIVER PULP AND PAPER COMPANY,
vs. *Plaintiffs,*
KAUKAUNA WATER POWER COMPANY, MATTHEW J. MEADE, HARRIET S. EDWARDS, THE GREEN BAY AND MISSISSIPPI CANAL COMPANY, MICHAEL A. HUNT, ANNA HUNT, HENRY HEWITT, JR., AUG. L. SMITH, KAUKAUNA PAPER COMPANY, AMERICAN PULP COMPANY, W. P. HEWITT, JOHN JANSEN, PETER REUTER, ALEXANDER REUTER, THE CHICAGO & NORTH-WESTERN RAILWAY COMPANY, MILWAUKEE, LAKE SHORE & WESTERN RAILWAY COMPANY, DAVID MCCARTNEY, G. LIND, JAMES H. ELMORE, JOSEPH CARLSON, BROKAW PULP COMPANY, BADGER PAPER COMPANY, B. AYMAR SANDS, JOSEPH KLINE, MICHAEL KLINE, HENRY D. SMITH, HERMAN ERB, ASEL W. PATTEN, CHARLES S. FAIRCHILD, and REESE PULP COMPANY, *Defendants.*

Upon reading and filing the findings of fact and conclusions of law of the Hon. R. N. Austin, judge of said court, and his order for judgment herein, and upon motion of B. J. Stevens and E. Mariner, attorneys for the defendant, the Green Bay and Mississippi Canal Company,

It is hereby considered, adjudged and decreed, that the defendant, the Green Bay and Mississippi Canal Company, is the owner of and entitled, as against all of the parties to this action and their successors, heirs and assigns, to the full flow of the river not necessary for navigation from the said upper or government dam, across the Fox river at Kaukauna, and is not obliged to permit any of the water of the river or pond to flow over the dam, but is entitled to withdraw from the pond made by said dam all of the surplus waters not necessary for navigation, either through the canal extending from the pond to slack water below the rapids, or directly from the pond, and use the same from said canal or said pond, and let such water to others to be used wherever it may be available for water power, and return the same to the river where it shall see fit, and is not obliged to permit any of the water from the river or pond to flow over said dam; and

Second. It is further considered and adjudged that all and singular the other parties to this action are hereby forever enjoined from interfering with the said Green Bay and Mississippi Canal Company in so withdrawing and using such water.

Third. It is further considered, adjudged and decreed, as in favor of the Patten Paper Company against all the other defendants, that all of the water of the river which is permitted by the Green Bay and Mississippi Canal Company to flow over the upper dam or into the river above Island No. 4, so as to pass down the river, should be and it is hereby divided and apportioned between the plaintiffs and their successors and assigns, the Kaukauna Water Power Company and its successors and assigns, and the Green Bay and Mississippi Canal Company and its successors and assigns, between, and to the

south, middle and north channels of the river in the following proportions, that is to say: $^{43}/_{200}$ part of the water so permitted to flow down the river of right should flow down the south channel, $^{157}/_{200}$ of the whole flow of the river so permitted to flow over the dam should of right flow down the main channel of the river, north of Island No. 4 and that of the water so permitted to flow down the main channel of the river, north of Island No. 4 and above the middle channel of $^{62}/_{157}$ should of right flow down the middle channel and south of Island No. 3, and that of the water flowing down the north channel, north of Island No. 4 and above Island No. 3, $^{95}/_{157}$ part should of right flow down the north channel and north of Island No. 3, and each of the other parties to this action, their heirs, successors and assigns, are forever enjoined from interfering with the waters of said river so permitted to flow over the dam or into the river above Island No. 4, so as to prevent their flowing into said channels in the proportions aforesaid.

Fourth. Nothing in this judgment contained shall in any wise conclude the Green Bay and Mississippi Canal Company from recovering against the Kaukauna Water Power Company compensation for water which it has heretofore drawn or shall hereafter withdraw from the pond created by said upper dam, with the assent of the Green Bay and Mississippi Canal Company.

Fifth. That the Green Bay and Mississippi Canal Company do have and recover of and from the Patten Paper Company (Limited), the Union Pulp Company and the Fox River Pulp and Paper Company, plaintiffs, and the Kaukauna Water Power Company, Henry Hewitt, Jr., and Wm. P. Hewitt, defendants, the sum of two hundred and fifty-eight and $^{90}/_{100}$ dollars, as and for its costs and disbursements, upon the issue made by its answer and its cross complaint herein.

Sixth. That the plaintiffs, the Patten Paper Company (Limited), the Union Pulp Company, and the Fox River Pulp and Paper Company, defendant, have and recover of and from the defendants, the Kaukauna Water Power Company, the sum of two hundred forty-nine and $^{44}/_{100}$ dollars, as and for its costs and disbursements, upon the issue made by the complaint for the partition and the division of the waters of the Fox river.

Dated January 19, 1894.

By the Court, R. N. AUSTIN, *Judge*.

On appeal the above judgment was reversed by the Supreme Court of the State, June 20, 1895, 90 Wis., 370, and thereupon the first opinion was filed, to-wit:

IN SUPREME COURT, STATE OF WISCONSIN.

THE GREEN BAY AND MISSISSIPPI CANAL COMPANY,		*Repondent*,
	vs.	
KAUKAUNA WATER POWER COMPANY,		*Appellants*.

In 1846, congress granted to the State of Wisconsin, when it should become a State, certain lands to be used in improving

the navigation of the Fox and Wisconsin rivers. In 1848, the State accepted the grant, and placed the construction, maintenance and operation of such improvement under control of a Board of Public Works. Section 15 of the act provided: "In the construction of such improvements, the said board shall have power to enter on, to take possession of and use all lands, waters and materials, the appropriation of which for the use of such works of improvement shall in their judgment be necessary." This Board of Public Works entered upon the work of improving the navigation of those streams. In 1853, the legislature incorporated the Fox and Wisconsin Improvement Company and granted to it all the works of improvement, land and property of the State connected therewith, on condition that it should prosecute the work of improvement with vigor. The property owned by the State and granted to the Improvement Company, consisted in an easement in the lands occupied by the canal, dams and ponds, and the water powers incidentally created by the dams. The water powers which the State owned and transferred to the Improvement Company, were such as the State owned by virtue of section sixteen (16) of the Act of 1848, which provided: "Whenever a water power shall be created by reason of any dam or other improvement made on any of said rivers, such water power shall belong to the State." The State did not take or own real estate below its dams, except what was taken for and occupied by the canal. In 1866, all the title and interests of the Improvement Company in all the works of improvement, lands and property, including the water powers created by the improvements, were sold under a judgment of foreclosure and sale under a deed of trust, executed by the Improvement Company. The purchasers became incorporated as the Green Bay and Mississippi Canal Company, which became the owner of all the property and improvements which had been owned by the Improvement Company. In September, 1872, the Green Bay and Mississippi Canal Company conveyed its canal and works of improvement to the United States, reserving to itself all its water powers in the following language: "The water powers created by the dams and the use of the surplus waters, not required for purposes of navigation, * * * and lots necessary to the enjoymont of the same."

In this manner the Green Bay and Mississippi Canal Co. has derived whatever title and rights it has in the water powers created by the improvements and in the water of the streams.

The Green Bay and Mississippi Canal Company, and its said predecessors in title, made many and expensive works of improvement for the purpose of facilitating the navigation of the Fox River, such as dams, canals and locks. The Fox river is a navigable stream which has an ordinary flow of about three hundred thousand (300,000) cubic feet a minute, and in low water a flow of one hundred and fifty thousand (150,000)

cubic feet a minute. At Kaukauna there was a rapids which had a descent of about forty-two (42) feet from the head of the rapids to slack water below, a distance of about one mile and a half. The flow of one hundred and fifty thousand (150,000) cubic feet a minute of the water down this rapids affords a power equal to three hundred (300) horse power per foot fall. This is substantially equal to twelve thousand, six hundred (12,600) horse power on the whole rapids.

Between the years 1851 and 1856 a public dam was built under the Act of 1848, at Kaukauna, at the head of the rapids, for the purpose of creating slack water above and feeding a canal around the rapids. This dam created about a nine-foot head, equal to about twenty-seven hundred (2,700) horse power of water. A navigable canal was constructed from the pond made by this dam to slack water below the rapids. One thousand (1,000) cubic feet of water a minute is required for the use of the canal, for the purposes of navigation during the season of navigation. This is less than one per cent. of the natural flow of the stream. The rest constitutes the surplus water power which is created by the dam.

The river between the dam and slack water below is rapids and has never been navigable. It is divided by islands into three principal channels, known as the north, middle and south channels. All these islands were surveyed and sold as separate parcels of land by the United States. Island No. 4 is about seven hundred (700) feet below the dam, and is about one hundred and thirty-five (135) rods long. Island No. 3 is about seventy (70) rods below the head of Island No. 4. The water in the river below the dam, by nature, flowed, ninety-five two hundredths ($^{95}/_{200}$) in the north channel, sixty-two two hundredths ($^{62}/_{200}$) in the middle channel, and forty-three two hundredths ($^{43}/_{200}$) in the south channel. The natural ordinary flow of the water down the rapids affords three hundred (300) horse power per foot fall. This is substantially twenty-seven hundred (2,700) horse power at the dam and twelve thousand six hundred (12,600) horse power below the dam.

The crest of the government dam is lower than the walls of the canal. So that so much of the flow of the stream as is not used for navigation must pass over the dam and down the channel of the stream over the rapids, and past the lower riparian proprietors, unless it is diverted for purposes other than the uses of navigation.

The canal takes its water from the pond immediately above the dam, at the north bank of the stream. Its course for some distance is nearly along the north bank of the stream. From the intake of the canal to the first lock, a distance of more than eleven hundred (1,100) feet, the waters of the canal are on the same level as the waters in the pond. There was, at one time, a guard lock at the point where the canal meets the pond, to protect

the banks of the canal in times of freshet. This guard lock is no longer used and is out of repair. The Green Bay and Mississippi Canal Company has cut the south bank of the canal between the dam and the first lock, in several different places, in order to make water power, for its own mills, and to be leased to others. For this purpose it diverts through the canal and through its sluice-ways through the bank of the canal, a large part of the natural flow of the water of the stream, and discharges it again below the heads of Islands Nos. four (4) and three (3). So that a considerable part of the natural flow of the stream is wholly diverted from the south and middle channels. This diversion of the water of the stream works great detriment to the riparian owners of water powers below the government dam, and, by accelerating the current, impairs navigation.

The action was brought, originally, by the Patten Paper Company (Limited), to obtain an adjudication of the relative proportion of the flow of the river below the dam, in the several channels, and to enjoin the Kaukauna Water Power Company from diverting any water to the south channel which of right should flow in the middle channel. But in the course of the litigation the issues have been changed and enlarged, so that now the principal question involved is the right of the Green Bay and Mississippi Canal Company to divert the water of the stream for water power, by means of the canal and its sluice-ways, from the riparian proprietors of water powers below the dam.

All the parties to the action, except the Green Bay and Mississippi Canal Company, are riparian proprietors or lessees of water powers, upon the rapids, below the dam, who are damaged by the diversion of the water from its accustomed channels.

The Green Bay and Mississippi Canal Company in its pleadings, in the nature of a cross complaint, claims that "it is the owner of all the water power created by the government dam, in question, and has the right to make exclusive use of the same at any point on its own lands where the same can be made available, and particularly at points or places on said dam, including its extension to the said lock."

The other parties to the action denied this right, and over this issue is the contention. The Superior Court, among other things, adjudged as follows: "It is hereby considered, adjudged and decreed that the defendant, the Green Bay and Mississippi Canal Company, is the owner of and entitled, as against all of the parties to this action and their successors, heirs and assigns, to the full flow of the river not necessary for navigation from the said upper or government dam across the Fox river at Kaukauna, and is not obliged to permit any of the water of the river or pond to flow over the dam, but is entitled to withdraw from the pond made by said dam all of the surplus waters not necessary for navigation, either through the canal

extending from the pond to slack water below the rapids, or directly from the pond, and use the same from said canal or said pond, and let such water to others to be used wherever it may be available for water power, and return the same to the river where it shall see fit, and is not obliged to permit any of the water from the river or pond to flow over said dam; and it is further considered and adjudged that all and singular the other parties to this action are hereby forever enjoined from interfering with the said Green Bay and Mississippi Canal Company in so withdrawing and using such water."

From this and some other parts of the judgment, Patten Paper Company (Limited) et al., Kaukauna Water Power Company et al., Henry Hewitt, Jr., and William P. Hewitt appealed.

NEWMAN, J.: It is settled, by the decision in *Green Bay and Mississippi Canal Company vs. Kaukauna Water Power Company*, 70 Wis., 635, and S. C. 142 U. S., 254, that the respondent in these appeals, the Green Bay and Mississippi Canal Company, is the legal owner of all the water power which has been created by the dam at the head of the rapids at Kaukauna, beyond what is required for the purpose of navigation; and that it has all the right and title in that water power which the state acquired in it under section sixteen (16) of the act of 1848; and that such title amounts to entire and absolute ownership. But the court, in those cases, did not "determine the relative rights of the respondent and the other riparian owners, below the dam, in respect to the use of the water which would run over the dam, if not taken from the pond into the canal;" nor "whether there is any restriction upon the manner, or place, in which the water shall be returned to the river, below the dam."

The questions so left undecided in that case are the very questions presented by the record for decision here. The court is now called upon to determine and define the relative rights of the respondent and the other riparian owners, below the dam, in respect to the use of the water which would run over the dam if not taken from the pond through the canal to furnish water power lower down the stream; and whether there is any restriction in the manner, or place, in which the water shall be returned to the river, below the dam. There is no question of the right of the government to divert through the canal so much of the water of the stream as is required for the the purpose of navigation. This amounts to about one per cent. of the water of the stream. The controversy concerns only the use of the surplus water after the purposes of navigation have been served.

The ordinary rule governing such questions would, no doubt,

reqnire the person owning or controlling the Kaukauna dam and the water power created by it to so use his right as that the water should be returned to the stream in such a manner and at such a place as not to deprive a lower riparian owner of its use as it has been accustomed to flow past his banks. For, as said by Lyon, J., in *The Kimberly & Clark Co. vs. Hewitt*, 79 Wis., 334, "the rule is elementary that, unless affected by license, grant, prescription, or public right, or the like, every proprietor of land on the bank of a stream of water, whether navigable or not, has the right to use the water as it is wont to run, without material alteration or diminution; and no riparian owner has the right to use the water of the stream to the prejudice of other riparian owners, above or below him, by throwing it back upon the former or subtracting it from the latter." This must be the extent and limit of the respondent's right, unless the State, whose title it has acquired, had greater rights.

The statute which vested the title to this water power in the State is in these words: "Whenever a water power shall be created by reason of any dam erected or other improvement made, * * * such water power shall belong to the State." Sec. 16, Act of 1848. It is by no means clear that this statute invested the State with a title more absolute, or with rights more extensive or exclusive, in the water of the stream than would belong to the owner of both banks of the stream who should have erected the dam for the purpose of creating water power. Such a private owner would own the water power created by the dam, absolutely and entirely, subject only to the public right to divert the water required for navigation. It is not easy of apprehension how the State could acquire a title more ample.

The State could acquire title to such water power only as was created by improvements in the stream which it might lawfully make. It could not lawfully make a dam or any other improvement in the stream for the purpose of creating a water power, if such improvement should work injury to a lower riparian owner, any more than could a private person. For the riparian rights of the lower owners of land upon the bank of the stream are property such as cannot be taken by the State for even a public use—except in aid of navigation—without compensation to the owner, and cannot be taken at all, or impaired, for a private use. (*Chapman v. R. R. Co.*, 33 Wis., 629; *Delaplaine v. Ry. Co.*, 42 Wis., 214; *Janesville v. Carpenter*, 77 Wis., 288; *Attorney General v. Eau Claire*, 37 Wis., 400-436; *Cole v. LaGrange*, 113 U. S., 1; *Kaukauna Water Power Co. v. Green Bay and Mississippi Canal Co.*, 142 U. S., 254, 272-73.

The right of the State to improve the stream as a highway and for the purpose of aiding its navigation, is superior to the rights of riparian owners. It may take and divert, absolutely and without compensation, so much of the water of the stream as may be required to improve its navigation. But that is the limit of its right. But, because it is not practically feasible to measure and determine with exactness the amount of water required for this public purpose some discretion is allowed. And it may well happen that an excess of water will be produced by a dam. As in this case, it may be necessary to stop the entire flow of the stream, by a dam, in order to divert some small part of the water for the uses of navigation. In that case the surplus need not be permitted to run to waste. The power so created by the surplus water may be leased or sold. This is the water power, created by the dam, which the State owned.

In *Kaukauna Water Power Company vs. Green Bay and Mississippi Canal Co., supra*, on page 273, it is said, "it is probably true that it is beyond the competency of the State to appropriate to itself the property of individuals for the sole purpose of creating a water power to be leased for manufacturing purposes." And on page 275: "The true distinction seems to be between cases where the dam is erected for the express or apparent purpose of obtaining a water power to lease to private individuals, or where in building a dam for a public improvement a wholly unnecessary excess of water is created, and cases where the surplus is a mere incident to the public improvement and a reasonable provision for securing an adequate supply of water at all times for such improvement. * * * So long as the dam was erected for the *bona fide* purpose of furnishing an adequate supply of water for the canal, and was not a colorable devise for creating a water power, the agents of the State are entitled to great latitude of discretion in regard to the height of the dam and the head of water to be created." But it is not the dam itself of which complaint is made. It is claimed that the dam is unlawfully used as a colorable device for the purpose of creating a water power at a point, at some distance removed from the dam.

It is evident that the water power which was created incidentally, by the erection of the dam, is due to the gravity of the water as it falls from the crest to the foot of the dam. What further power it may have, in its present distribution, is not incidental to the erection of the dam, but such as has been added to it from deliberate design. The first reach of the canal, to the first lock, did not create a water power. No power existed there until the bank of the canal was cut for the very purpose of creating it. Until then all the water of the stream, not required for navigation, passed over the dam. There, it

created a power which was, in a true sense, incidental to the erection of the dam. The power created by the cutting of the canal was not incidental to the erection of the dam, or to the construction and use of the canal for navigation, but was *ex industria*, for the purpose of creating a water power. It was created for its own sake, and not incidentally. So far from being an incident to the lawful public improvement, it is in derogation of the public improvement. It impedes rather than aids the navigation of the stream.

In some sense, it may be said that the first reach of the canal down to the first lock, is a part of the dam. Since the use of the guard lock has been abandoned, it upholds the pond. In that sense it is a part of the dam. But as bearing upon the question as to what rights are incidental to the building of the dam proper, it is a perversion of terms and ideas. It is merely color, to cover the subtraction of the riparian right to this private use of the water of the stream.

There seems to be no sufficient ground for holding that the respondent has acquired additional right by prescription. Twenty years before the commencement of the action it had diverted and was diverting only a small part of the water of the stream. The amount diverted was inconsiderable. It was no such "strong act of exclusive possession" as that it was *per se* notice of an adverse claim of right.

The State owned no such right to divert the water from the lower riparian owners as is claimed by the respondent. The respondent has acquired no such right. The ordinary rule which governs the relative rights of riparian owners is the rule which governs this case. The lower owners are entitled to have the water—except what is required for navigation—returned to its accustomed channels, in such manner and place as that it shall flow past their lands, as it was accustomed to flow.

The judgment of the Superior Court of Milwaukee County is reversed upon each of the three appeals, and the cause is remanded with directions to enter judgment in accordance with this opinion.

Thereupon the Green Bay and Mississippi Canal Company moved in the Supreme Court for a rehearing, which motion was denied June 20, 1895, and the following opinion was then filed:

(After the title.)

NEWMAN, J.: This action was originally commenced by the Patten Paper Company (Limited) to obtain an adjudication of the relative proportions of the flow of the river below the dam, in the several channels, and to enjoin the Kaukauna Water Power Company from diverting any water to the south channel which, of right, should flow in the middle channel. An

adjudication of these relative rights is included in the judgment of the trial court, and all parties are by it enjoined from interfering with the flow of the water in the several channels in the proportion adjudged to be due to each channel.

There is no appeal from this part of the judgment, so no consideration of it by this court is due or proper.

But, in the course of the litigation, a new issue was introduced by the Green Bay and Mississippi Canal Company. It claimed that by its purchase from the State of the canal and improvements and the water powers which were created by the improvements it became the absolute owner of the water of the stream, with the rights, as against the owners of water powers on the rapids below the Kaukauna dam, to divert all the water of the stream and to use it wherever it best suited its interests, and to return it to the stream wherever it choose, regardless of its effect upon the water powers and rights of such lower owners. This claim the trial court sustained to its full extent. It gave judgment sustaining it, and enjoined all the other parties to the action from interfering with the complete exercise of the rights so claimed. From this part of the judgment these appeals were taken. The right of this contention of the Green Bay and Mississippi Canal Company was the only question presented by these appeals.

This court held that the Green Bay and Mississippi Canal Company owned all the water power which was created by the construction and operation of the government dam at Kaukauna; that it had the right to use all the water of the stream not used for the purposes of navigation for the purpose of power wherever it could or choose, so far as it could do so without impairing the just rights of other owners of water powers upon the stream; that it was due to other owners of water powers below the dam that the water after being used by it should be returned to the stream, at such place and in such manner as that it shall flow past the banks of such lower owners, in its accustomed channels, and as it was accustomed aforetime to flow. The limit to its right is at the point where it infringes upon the rights of others.

It concedes to it all the rights which the State had, or could acquire, as against such lower owners. The place where it may use the water, for power, is restricted only by its duty to refrain from injuring others.

The court is satisfied of the correctness and justice of its judgment. It is not deemed to be inconsistent with anything previously said or decided by this court, or to the decision of any other court to which attention has been called. It is believed to be grounded, impregnably, upon that widely applied mandate of the law, *sic utere tuo ut alieum non laedas*. But,

it is urged upon this motion, that the language of the opinion is only general, and will not enable the trial court to determine and direct in what specific place, or in what precise manner, the water must be returned to the stream; nor how and where the respondent may lawfully use that relative proportion of the flow of the stream which is appurtenant to its bank below the dam. Probably this is a just estimation of the opinion. It has assumed to determine only the general principle by which the relative rights of the parties are to be determined; and has pronounced that general principle in general terms only. It could well do no more. The court had no concrete question before it. No such issue was made, nor such judgment asked, by the respondent's pleading; nor was any such issue adjudged by the trial court; nor does the record furnish *data* by which such questions can be determined by this court.

These are practical questions which cannot be answered by the aid only of mere theory. Probably it cannot be satisfactorily predicted in advance of experiment just where and how the water must be returned to the stream, so as to work no injury to lower owners. Certainly it cannot be determined by a court without evidence of some kind.

The court has performed its full function in this case when it has established the general rule which governs it.

The judgment of the Superior Court of Milwaukee County is reversed, upon each of the three appeals, as to those parts of the judgment which were appealed from, and the cause is remanded with direction to enter judgment in accordance with the opinion.

By the Court:

The motion for rehearing is denied.

After the cause was remitted to the Trial Court and pursuant to the direction of the foregoing opinions, and after full hearing the following judgment was entered on September 27th, 1895, in the Superior Court of Milwaukee County, and the same, *as I understand it, is the judgment from which this writ of error is taken:*

(After the title.)

A separate appeal having been taken to the Supreme Court of the State of Wisconsin by the Patten Paper Company, Limited, Union Pulp Company and Fox River Pulp and Paper Company, plaintiffs in said main action; a separate appeal also having been taken by the Kaukauna Water Power Company, Matthew J. Meade, Harriet S. Edwards, Milwaukee, Lake Shore & Western Railway Company, G. Lind, Joseph Carlson, Brokaw Pulp Company, Badger Paper Company, B. Aymar Sands, Joseph Kline and Michael A. Hunt, defendants in said main suit; and a separate appeal also having been taken to the Supreme Court of the State of Wisconsin by the defendants in the main suit, Henry Hewitt, Jr., and William P. Hewitt; all of the said appeals being from the judgment rendered and entered herein on the issue joined upon the said cross complaint of the Green Bay and Mississippi Canal Company on the 19th day of January, 1894; and said judgment so entered in and by this court on said 19th day of January, 1894, having been reversed upon each of said separate appeals by the judgment of said Supreme Court; and said Supreme Court having remitted to this court the record and papers transmitted to said Supreme Court on said appeals, together with its decision, wherein, among other things, it decided and directed that this cause be and the same is hereby remanded to the said Superior Court with directions to enter judgment in accordance with the opinion of this court.

And whereas, the judgments and remittiturs upon the other two appeals were in the same language, except as to the amount of costs of the Supreme Court taxed therein.

First. Upon motion of Hooper & Hooper, plaintiff's attorneys, it is considered, adjudged and decreed, as in favor of the Patten Paper Company (Limited), Union Pulp Company, Fox River Pulp and Paper Company against all the defendants, that all of the water of the river, except that required for purposes of navigation shall be and is hereby divided and apportioned between and to the south, middle and north channels of the river in the following proportions, that is to say: $^{43}/_{200}$ thereof of right should flow down the south channel, $^{157}/_{200}$ thereof should of right flow down the main channel of the river, north of Island No. 4, and that of the water so of right flowing down the main channel of the river, north of Island No. 4 and above the middle channel, $^{62}/_{157}$ thereof should of right flow down the middle channel and south of Island No. 3, and that of the water flowing down the north channel, north of Island No. 4 and above Island No. 3, $^{95}/_{157}$ part should of right flow down the north channel and north of Island No. 3, and each of the parties to this action, their heirs, successors

and assigns, are forever enjoined from interfering with the waters of said river so as to prevent their flowing into said channels in the proportions aforesaid.

Second. Upon motion of Messrs. Fish & Cary, attorneys for the said appellants, Kaukauna Water Power Company and others, and David S. Ordway, attorney for said appellants, Henry Hewitt, Jr., and William P. Hewitt, it is considered and adjudged, upon the issues joined by the cross complaint of the defendant, Green Bay and Mississippi Canal Company, and the several answers made thereto by the other parties to this action, defendants in said cross complaint, that the water power which was created, incidentally, by the erection of said dam at Kaukauna, is due to the gravity of the water as it falls from the crest to the foot of the dam proper, across said river, and not to the use of the water of said river through said canal, and that neither said State of Wisconsin, nor said Green Bay and Mississippi Canal Company, as assignee of said State, ever acquired or owned any water power upon said river at Kaukauna, by reason of, or as incidental to, the construction and use of said canal for navigation.

Third. And it is further adjudged by the court, that said Green Bay and Mississippi Canal Company, its successors and assigns, shall so use the water power, if at all, created by said dam, as that all the water used for water power or hydraulic purposes shall be returned to the stream in such a manner, and at such place, as not to deprive the appellants, or those claiming under or through them, of its use, as it had been accustomed to flow past their banks, and that it shall flow past the lands of said appellants on said river, and in the several channels of said river below said dam, as it was accustomed to flow, and that said appellants have the right to use the water of said river, except such as is or may be necessary for navigation, as it was wont to run in a state of nature, without material alteration or diminution.

Fourth. And it is further adjudged, that the relief demanded in said cross complaint be denied, except as hereinbefore adjudged.

Fifth. And it is further adjudged, that the appellants Patten Paper Company—Limited, Union Pulp Company, and Fox River Pulp and Paper Company, have and recover of and from the Green Bay and Mississippi Canal Company, respondent in said cross complaint, the sum of one hundred seventy dollars and seventy-three cents, for their costs and disbursements upon the issue made by their answer to the cross complaint herein aforesaid.

Sixth. And it is further adjudged, that the defendants in said cross complaint, Kaukauna Water Power Company, Mat-

thew J. Meade, Harriet S. Edwards, Milwaukee, Lake Shore & Western Railway Company, G. Lind, Joseph Carlson, Brokaw Pulp Company, Badger Paper Company, B. Aymar Sands, Joseph Kline, and Michael A. Hunt, have and recover of and from the Green Bay and Mississippi Canal Company, plaintiff in said cross complaint, the sum of seven hundred forty-five dollars and forty-seven cents, for their costs and disbursements upon the issue made by their answer to the cross complaint herein of said Green Bay and Mississippi Canal Company.

Seventh. And it is further adjudged that the said Henry Hewitt, Jr., and William P. Hewitt, defendants in said cross complaint, have and recover of and from said Green Bay and Mississippi Canal Company, plaintiff in said cross complaint, the sum of one hundred thirty-five dollars and forty-seven cents, for their costs and disbursements upon the issue made by their answers to the cross complaint herein of said Green Bay and Mississippi Canal Company.

By the Court,

R. N. AUSTIN,

Judge.

On the 2nd day of November, 1895, the Canal Company appealed to the Supreme Court of the State from the above judgment, which appeal was dismissed on motion of defendants in error herein on March 10, 1896 (93 Wis., 283), when the following opinion was filed, viz.:

IN SUPREME COURT, STATE OF WISCONSIN.

PATTEN PAPER CO. ET AL., *Respondents,*

vs.

GREEN BAY AND MISSISSIPPI CANAL COMPANY, impleaded with others, *Appellant.*

CASSODAY, C. J.: This case was here upon former appeals, 90 Wis., 370. Those appeals were by three of the defendants in the cross bill filed by the Canal Company from so much and such part of the judgment of the trial court as sustained the paramount right of the Canal Company to all the water power created by the government dam at Kaukauna, and the exclusive right to use, or authorize others to use, the same wherever it might be available for water power; and to return the water to the river wherever it should see fit; but the balance of

that judgment, relating, as it did, to the partition of the water power between the several riparian owners below the dam, had been entered by agreement and stipulation between such riparian owners, including the Canal Company, and from those portions of the judgment there had been no appeal; and hence the same were never before this court for consideration. The portion of the judgment thus appealed from was thoroughly argued by able counsel on all sides; and then, after careful consideration and decision, was again re-argued and again decided with the following mandate: "The judgment of the Superior Court of Milwaukee County is reversed upon each of the three appeals, as to those parts of the judgment which were appealed from, and the cause is remanded with direction to enter judgment in accordance with the opinion." 90 Wis., 404. Upon the remittiturs being filed, the Canal Company asked leave of the trial court to amend its cross bill in certain respects, or to allege the same facts by way of defense and counterclaim to the original complaint for the partition of the water power below the dam. The trial court held that no such amendment was allowable at that stage of the case. Thereupon, and September 27, 1895, the trial court entered final judgment in pursuance of the mandate of this court. The Canal Company has in effect, appealed from the parts of that judgment upon the issues formed in the original action in favor of the plaintiffs therein and against the defendants therein; and also that part of the judgment upon the issues in the cross action in favor of the defendants therein who appealed to this court; and also the first, second and third subdivisions thereof, and especially from such parts of the judgment, if any, as require the Canal Company to return the water in excess of that required for navigation from the canal to the river, either at the dam or in such place and in such manner as not to deprive the respondents herein and those claiming under or through them of its use as it had been accustomed to flow past their banks. The respondents now move to dismiss the appeal on the ground that the judgment entered is in exact accordance with the mandate of this court. Counsel for the appellant contend that the judgment is not in exact accordance with the two opinions of this court, and hence not in exact accordance with the mandate. We perceive no inconsistency in the two opinions, but if there is any, the one on the motions for re-argument—being last—would prevail. Mr. Justice Newman wrote both opinions, and in the last he construes the first, and in effect said: "This court held that the Green Bay and Mississippi Canal Company owned all the water power which was created by the construction and operation of the government dam at Kaukauna; that it had the right to use all the water of the stream,

not used for the purposes of navigation, for the purposes of power, wherever it could or chose, so far as it could do so without impairing the just rights of other owners of water powers upon the stream; that it was due to other owners of water powers below the dam that the water, after being used by it, should be returned to the stream at such place and in such manner as that it shall flow past the banks of such lower owners in its accustomed channels, and as it was accustomed aforetime to flow. The limit to its right is at the point where it infringes upon the rights of others. It concedes to it all the rights which the State had or could acquire as against such lower owners. The place where it may use the water for power is restricted only by its duty to refrain from injuring others. The court is satisfied of the correctness and justice of its judgment." 90 Wis., 403. This is the very gist of both the opinions and the decision. It is substantially embraced in the judgment before us. It seems to be as definite and certain as language can make it without fixing the limit by survey and metes and bounds. Certainly we did something more than determine that the Canal Company was not entitled to the whole water of the river as contended by counsel. So it is very obvious that counsel is in error in claiming that the right of the "Canal Company to draw the water through the canal as riparian proprietor" had not been considered by this court. This court had no power upon the former appeal, and has no power now, to leave open and undecided matters which were determined in the portions of the first judgment not appealed from. It would be an idle provision to insert in the judgment that the cross bill was dismissed without prejudice as to questions not determined by the trial court, or this court in the judgment before us on the former appeal; and it would have been improper to insert therein that the judgment was without prejudice as to questions determined in the first judgment, and not appealed from, or determined by this court on such appeal. After careful consideration we are constrained to hold that the judgment entered is a substantial compliance with the mandate of this court. Certainly it would have been improper to allow any amendment to pleadings or new litigation. The mandate was not for a new trial, nor for further proceedings according to law, but "with direction to enter judgment in accordance with the opinion," and the opinion left nothing undetermined. This left nothing for the trial court to do in the case except to enter judgment therein as directed. Sec. 3071, R. S., *Mowry v. First National Bank*, 66 Wis., 539; *Jones v. Jones*, 71 Wis., 513; *Whitney v. Traynor*, 76 Wis., 628; *Chouteau v. Allen*, 74 Mo., 56; *Strump v. Hornback*, 109 Mo., 277; *Young v. Thrasher*, 123 Mo.,

308. This we think it has done. Such being the record, the question recurs whether this appeal should be entertained or dismissed. We are clearly of the opinion that a judgment entered, as this was, in substantial accordance with the mandate of this court, is, in legal effect, the judgment of this court. It is just as effectualy *res adjudicata* as in a case where the judgment is affirmed. *Reed v. Jones*, 8 Wis., 421. In such a case this court has held that the proper practice is to dismiss the appeal. *Kluender v. Fenske*, 59 Wis., 35. We must hold that an appeal from a judgment entered in substantial accordance with the mandate of this court upon a previous appeal, must, upon motion of the respondent, be dismissed. *Stewart v. Salamon*, 97 U. S., 361; *Humphrey v. Baker*, 103 U. S., 736; *Mackall v. Richards*, 116 U. S., 45; *Texas & Pac. Ry. Co. v. Anderson*, 149 U. S., 237; *Aspen Mining & S. Co. v. Billings*, 150 U. S., 31. It has been held in the Supreme Court of the United States that compliance with a mandate of that court, which left nothing to the judgment or discretion of the trial court, might be enforced by mandamus. *City Bank v. Hunter*, 152 U. S., 512.

By the Court:

The appeal from the judgment of the Superior Court of Milwaukee County is dismissed.

A motion by the Green Bay and Mississippi Canal Co. was made for a rehearing, and on the 6th of May, 1896, denied, when the following opinion was filed:

PATTEN PAPER CO., (LIMITED), ET AL.,
Respondents,
vs.
GREEN BAY AND MISSISSIPPI CANAL COMPANY, impleaded with others,
Appellant.

CASSODAY, C. J.: The motion to dismiss the appeal in this case was granted March 10, 1896. This is a motion to vacate that order and to reinstate the appeal. It is true the motion was not made until more than thirty days after the decision dismissing the appeal, but it is claimed, that in making that decision, this court did not fully consider the status of the case in respect to the rights of the appellant; and hence that this is

a motion to correct a mistake in the record of this court within the meaning of Rule 21. The motion is in the nature of a motion for a rehearing, and as such should have been made within thirty days after the decision. Rule 20. By the statute, as originally enacted, the clerk of this court was required to remit the record to the court below within thirty days after the decision, unless the court directed the same to be retained for the purpose of enabling a party to move for a rehearing. Sec. 7, Ch. 264 L., 1860; 2 Taylor's Statutes, Sec. 7, Ch. 139. By the revision of 1878, the thirty days were changed to sixty days. Sec. 3071 R. S. While the motion is irregular and might be denied on that ground, yet, under the statute, as it now stands, we have no doubt that this court has retained jurisdiction over the case—especially as the papers in the case have been retained, by the direction of the court, for the purpose of this motion. Krall vs. Lull, 46 Wis., 643.

The case is important and should if possible be decided on the merits; and we feel it to be our duty to so decide it. Counsel for the appellant seems to be correct in claiming, that in deciding the motion to dismiss the appeal, we overlooked the fact that the complaint for the partition of the water in the river below the dam and above the head of the islands mentioned, admitted that the Canal Company was then drawing one-half the flow of the river, from the dam in and through its canal, to a point below the head of Island No. 3, and there used, or leased to others to be used, as water power, while passing from the canal, down into one or more of the channels below the dam; and that the prayer of the complaint asked no restraint of such drawing and use by the Canal Company, but simply asked an injunction against the Kaukauna Water Power Company, and that the court should determine and adjudge what share or proportion of the entire natural flow of the river was appurtenant to and of right should be permitted to flow in the south, middle and north channels of the river respectively. The purpose of the action was not to contest conflicting claims to water above the dam, nor such as flowed in the canal, but to partition the water which might flow in the river below the dam between the several owners thereof, as prescribed by the statutes. Chapter 203 laws 1881; secs. 3149–3152 S. & B. A. S. See also secs. 3101–3148, id. The Canal Company, being a riparian owner on Islands numbered three and four mentioned, was a proper and necessary party to such partition suit. Id. As such defendant it filed its cross bill therein and thereby claimed, not only the paramount right to all the water in the river for the purposes of navigation and the surplus water power incidental to the improvement, but also claimed the right to draw all such surplus water through the canal to

any point below where it might desire, and there to use the same or lease the same to others to be used as water power. The other parties to the action, conceding that the Canal Company had such paramount right for the purposes of navigation, and the paramount right to all the surplus water power incidental to the improvement, to be used at the dam or so near the dam as not to impair their just rights as riparian owners on the islands below the dam, yet denied the right of the Canal Company to use the canal as a mere head race to convey such surplus water to a point below or opposite the islands mentioned and there creating a water power by emptying the same into the river. The determination of the issues thus joined made it the duty of the trial court and of this court to determine where or about where such surplus water power as was merely incidental to the construction of the dam might be used or returned to the river below the dam. With the determination so made we are entirely satisfied. 90 Wis., 370. The Canal Company obtained its right to such surplus water power merely because it was and is incidental to the improvement. *Green Bay and Mississippi Canal Company v. Kaukauna Water Power Company*, 70 Wis., 635; S. C. affirmed on writ of error, 142 U. S., 254. See also *Attorney General v. Eau Claire*, 37 Wis., 400; S. C., 40 Wis., 533. *Bell v. The City of Platteville*, 71 Wis., 139. To hold as contended by the Canal Company would, to a certain extent at least, make the right of navigation incidental to the creation of the water power instead of the water power being incidental to the improvement of the river for navigation.

By the Court: For the reasons given, the motion to vacate the order dismissing the appeal and to reinstate the same is denied, with $10 costs and clerk's fees.

POINTS, AUTHORITIES AND ARGUMENT.

The first question to be propounded to the plaintiff in error is,—What title, right, privilege or immunity under the constitution of the United States, or under any treaty, or statute of, or commission held, or authority exercised under the United States is claimed by you?

The existence of such a title, right, privilege, etc., is the foundation of the federal question itself. *Hoadley v. San Francisco*, 124 U. S., 645.

The next question is,—Where does it appear in this record that such title, right, privilege, etc., was specially set up or claimed by the plaintiff in error in the state courts?

The third question is,—Where does it appear in this record that any such title, right, privilege or immunity, so specially set up or claimed by the plaintiff in error under the constitution, or any treaty, or statute of, or commission held, or authority exercised under the United States, was *by said state courts decided against said plaintiff in error*, and against the title, right, privilege or immunity so specially set up or claimed?

A fourth question is—Where does it appear in this record that there was drawn in question in the state court the validity of any statute of, or authority exercised under the State of Wisconsin, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of their validity, so that thereby the plaintiff in error was deprived of its property or rights contrary to the provisions of the constitution of the United States? The defendants in error, Kaukauna Water Power Co. and others; Henry Hewitt, Jr. and William P. Hewitt by their answers to said cross complaint, distinctly raised a federal question by stating their respective ownership of riparian rights below the dam and alleging that if the canal law of 1848 was held valid and broad enough to permit the diversion of the water of the river away from their said lands down stream from said dam, then that they would be deprived of their property without due process of law, and contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States. See record pages 160-169-170 and 179; therefore if the decision in the state court had been against them, this court would have had jurisdiction upon a writ of error taken on their behalf.

I.

This court cannot review the final judgment of the highest court of a state, even if it denied some title, right, privilege or immunity of the unsuccessful party, "unless it appear from the record that such title, right, privilege or immunity was specially set up or claimed in the state court as belonging to such party under the constitution, or some treaty, statute, commission, or authority of the United States." The above is a quotation from *the first head note* to the case of *Oxley Stave Co. vs. Butler Co.*, 166, U. S., 648.

The second head note is as follows:—"The words 'specially set up or claimed' in that section, imply that if a party in a suit in a state court intends to invoke for the protection of his rights the constitution of the United States, or some treaty, statute, commission or authority of the United States, he must so declare; and unless he does so declare 'specially,' that is, unmistakably, this court is without authority to re-examine the

final judgment of the state court. This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a federal right is left to mere inference."

After the trial court and the Supreme Court had disposed of this case without any federal question having been raised, and after the remittitur of the Supreme Court had been, with the record, returned to the trial court, with direction there to enter judgment pursuant to the mandate of the Supreme Court, *it was too late* to attempt, by way of amendment or otherwise, to introduce into the case any federal question, because the last judgment of the trial court finally disposed of and ended the action. It is true that the plaintiff in error appealed from that judgment, but its appeal was dismissed by the Supreme Court because said judgment was so entered in the trial court *strictly in accordance* with the mandate and opinion of the Supreme Court. Briefly stated,—The record herein does not show that a federal question was raised in the state court, in time, and in a way to give this court jurisdiction. *Louisville & Nashville R. R. Co. vs. Louisville*, 166 U. S., 709.

The opinion of the Wisconsin Supreme Court dismissing the appeal states the settled law of that court upon this subject, to-wit: That where a record is remitted by the Supreme Court to the trial court, with direction to enter judgment pursuant to the opinion of the Supreme Court, no further proceedings can be had in the action except to enter the judgment pursuant to the direction of the opinion: and it is even held that *no previous notice* by the prevailing party need be given to the opposite party of the entry of such judgment.

Pierce v. Kneeland, 9 Wis., 30. [Vilas & Bryants Ed. 24.]

This court, in *Wabash R. R. Co. vs. Defiance*, 167 U. S., 88, uses this language upon this subject: "The plaintiff claimed in the state court that certain provisions of the state enactment referred to were repugnant to the constitution of California. But he did not in the state court draw in question any statute of the state upon the ground that it was repugnant to the constitution of the United States, nor specially set up or claim in that court any right, title, privilege or immunity under the consitution of the United States. From the pleadings in the cause the state court had no reason to suppose that the plaintiff specially claimed that the statute in question deprived him of any right secured by the constitution of the United States. (Citing *Oxley Stave Co. vs. Butler County*, above herein cited.) If the plaintiff intended to claim that the statute in question

was repugnant to the constitution of the United States he should have so declared."

This doctrine is also stated in the case of *Winona & St. Peter Land Company v. Minnesota*, 159 U. S., 540, in the following language: "The federal questions sought to be raised in this court were not seasonably presented in the state courts. The alleged immunity from taxation and lack of due process of law were not 'specially set up or claimed' prior to the decision in the Supreme Court. The failure so to do prevents this court, as has been frequently held, from acquiring jurisdiction." Then follows the citation and mention of many of the cases in this court upon this subject *theretofore* decided.

In *Bushnell v. Crooke M. & S. Co.*, 148 U. S., 682, this court states very clearly the requirements of section 709 of the Federal statutes—*inter alia*: First head note is as follows:

"A federal question, suggested for the first time in a petition for a rehearing, after judgment in the highest court of a State, is not properly raised so as to authorize this court to review the decision of that court." This is a substantial quotation from the opinion, page 689.

I submit that the facts in the above case are substantially, so far as a federal question is concerned, if any such is suggested, identical with those presented by this record, and that the decision there, dismissing the writ will rule this case. On page 688 the opinion proceeds—"It is plainly manifest that neither the pleadings nor the instructions given and refused present any federal question, and an examination of the opinion of the Supreme Court * * * * fails to disclose the presence of any federal question. It does not appear from the record that any right, privilege or immunity under the constitution or laws of the United States was specially set up or claimed by the defendant below, or that any such right was denied them, or was even passed upon by the Supreme Court of the State, nor does it appear, from anything disclosed in the record, that the necessary effect in law of the judgment was the denial of any right claimed under the laws of the United States. * * * (on page 689). The question involved in the present case turned largely upon the provisions of * * * Annotated Statutes of Colorado and the decisions of the Supreme Court of that State construing the same, * * * which limited the width of mining claims to 150 feet in width on each side of the centre of the lode or vein at the surface. The controverted question in the case at bar turned upon which direction the Monitor lode properly ran south of the discovery shaft and it being found by the jury that the lode or vein did not bear westwardly toward the Annie lode, but southwestwardly and across the western side line of the Monitor claim at a distance exceeding 150 feet from

the centre of the Annie lode, it followed that the claim of the plaintiff below was sustained, * * * The question thus presented and decided involved no construction of any federal statute, nor did it become necessary to determine the rights of the parties under the federal mining statutes."

I think, if I understand rightly the assignments of error in this cause, found at pp. 8 to 15 of printed record, that no one of them goes upon a right claimed under federal statutes or federal authority *alone*. They all go as well upon rights claimed under the State law of Aug. 8, 1848, and rights claimed by its peculiar construction of its own deed to the United States of the Improvement by which it retained certain water power rights which the United States declined to purchase, and which the Supreme Court of the State in its judgment and opinions found in this record and above printed, decided were not the water powers claimed in its cross complaint, but were such only as were created by the dam *proper*.

I only refer to the assignments of error for the purpose of showing that the plaintiff in error did not intend to claim, in the State Court, any right supposed to have been given to it by federal statutes or authority alone. Of course, no federal question can be injected into such an action or cause by assignments of error *merely*, or by petition for such writ containing allegations of error which are not to be found elsewhere in the record itself.

II.

When the real point of decision in the judgment from which the writ of error is taken *goes upon two grounds*, if one might have been federal, and the other was non-federal and broad enough in itself to support the final judgment without reference to the federal question, the Supreme Court of the United States is without jurisdiction, and the writ of error will be dismissed. *Egan v. Hart*, 165 U. S., 188, where, at page 191, this court announces such doctrine in the following words: "It is clear that if these questions of fact are adequate to determine the controversy between the parties, and broad enough to maintain the judgment independent of any federal question, then we are without jurisdiction, although the State Court may have also decided such a question." (See authorities cited in the opinion on page 191, and *Electric Company v. Dow*, 166 U. S. at page 491; *Miller's Executors v. Swan*, 150 U. S., 132.

III.

The plaintiff in error nowhere in this record sets up or claims any right or title to the use of the *whole* water of the river or the power created by the fall thereof from the foot of the government dam down stream, except by, through or under the canal law of the State, of Aug. 8, 1848. It neither had or claims any other or *independent* title to such right, and the State Court decides that upon a proper construction of that Act, the water power mentioned in the same was such as was created "at the dam," and defines the dam as "*dam proper*," in a sentence found in the opinion of the court at page 546 of the record, which sentence I quote: "*In some sense it may be said that the first reach of the canal down to the first lock is a part of the dam. Since the use of the guard-lock has been abandoned it upholds the pond. In that sense it is a part of the dam. But as bearing upon the question as to what rights are incidental to the building of the dam proper it is a perversion of terms and ideas. It is merely color to cover the subtraction of the riparian right to this private use of the water of the stream.*" (Italics mine.)

Certainly such decision and construction *was not in favor of the validity of any statute of the State of Wisconsin, or authority exercised under the State, whereby any right of the plaintiff in error so claimed under such State statute was denied to it*,—the decision of the State Court was *against* the validity *of the claim* of the plaintiff in error under such statute, *and against the validity of the statute so far as the same was* by the plaintiff in error claimed to give to it any right or title to the use of the water of said river for hydraulic purposes below or at any level down stream from the foot of said government dam.

I therefore respectfully submit that this is another to be added to that long list of cases which have been brought to this court from courts of the various States where the questions decided below were mere matters of common law cognizance, or involved only the construction of State statutes.

I cite and quote the language of this court in a few cases, of the class to which I refer:

"The construction given to a statute of a State by the highest tribunal of such State is regarded as a part of the statute and is as binding upon the courts of the United States as the text:" *Leffingwell v. Warren*, 2 Black, 599. *Bucher v. Cheshire R. R. Co.*, 125 U. S., pages 582, 583, 584. *Burgess v. Seligman*, 107 U. S., 20. *Luther v. Borden*, 7 How., 1–40. In *Aberdeen Bank v. Chehalis County*, 166 U. S., at page 444, the

doctrine is stated in these words: "That the two sections of the State law should be read together is obviously proper, and at any rate we are bound by the judgment of the Supreme Court of the State in the mere matter of the construction of that law."

It is stated in the opinion in the former case between these parties, *i. e., Kaukauna W. P. Co., plaintiff in error, vs. Green Bay and Miss. Canal Co., defendant in error,* 142 U. S. at pages 271, 272 and 273, after setting forth the rights of riparian owners upon navigable streams in Wisconsin and their limitations, at page 274, as follows: "*With respect to such rights we have held that the law of the State as declared by its Supreme Court is controlling as a rule of property.*" See also cases there cited.

In *Davis v. Mass.*, 167 U. S. at page 48, in opinion, this court says: "*The finding of the court of last resort* of the State of Massachusetts being that no particular right was possessed by the plaintiff in error to the common, is in reason, therefore, conclusive of the controversy which the record presents," * *

So in this case, the State Supreme Court construed section sixteen (16) of the State canal law of 1848, against the contention of the plaintiff in error, and held that said section 16 only applied to water power created by reason of the dam proper. The Act did not define, in terms, what exact water power was intended. By section 15 of the Act, the board were authorized "*to take possession of and use all lands, waters and materials, the appropriation of which for the use of such works of improvement shall, in their judgment, be necessary.*" And see *Morley v. L. S. Ry. Co.*, 146 U. S., 162 and 166, 167.

The Board *in no way*, so far as this record shows, made any written declaration to the effect that such water or use of the same below the dam was or would be necessary, nor did its plan of improving these rapids indicate any such determination. The construction of the dam and small canal without openings or gates for the discharge of water for hydraulic purposes, said plainly, that all surplus water, over and above what was necessary for navigation was to pass over the dam into the channels of the river below for the use of the respective owners of the bed and banks of the river—and never until the institution of this suit did a determination of the question arise as to where the water of the river was to be returned to its bed after serving the purposes of navigation. It thus devolved upon the Supreme Court of the State to construe and determine the meaning of said canal law of 1848, which it has done fully and understandingly and against the persistent contention of the plaintiff in error, as will clearly appear from reading the opinions above printed. From such opinions it also appears

plainly that *no decision of any federal question can be found or spelled out of* either the judgment or such opinions, *nor does it appear that the decision of a federal question was necessary to the determination of the case, or that the judgment as rendered could not have been given without deciding a federal question.*

IV.

It is respectfully submitted that there is abundant *color* in this record for the uniting of a motion to affirm, with the motion to dismiss. The opinions of the State Supreme Court above printed, alone, as it seems to me, show plainly, taken in connection with the opinion of this court—142 U. S., pages 272, 273, 274, that the question of diversion of water was decided correctly, whether such decision involved a federal question or not, and that the writ of error was taken for delay only.

That decision rests as well upon common law doctrine as upon many decisions cited to and considered below by the Supreme Court of the State in this suit; *inter alia;*

"Ever since the YEAR BOOKS, it has invariably been held, that it is illegal to *divert* a water course, unless authorized or justified by the particular circumstances of the case.

Angell on Water Courses (6th Ed.), page 111, §97.
Gould on Waters (2nd Ed.), §§205, 215 and Note 4.

Mr. Angell, in same Ed., p. 113, §100, continues:

"Whenever a water course divides two estates, the riparian owner of neither can lawfully carry off any part of the water without the consent of the other opposite, and each owner is entitled, not to a half or other proportion of the water, but to the whole bulk of the stream undivided and indivisible, or *per my et per tout.*"

Richardson v. Emerson, (A. D. 1850) 3 Wis., 319. (**Dixon's Ed. at page 291 in opinion.**)
Mohr v. Gault, (A. D. 1860) 10 Wis., 513. (**Vilas and Bry. Ed. 460, 461.**)
Case v. Hoffman, 84 Wis., page 448.
Varick v. Smith, 5 Paige 137 and 9 id., 548.
Webb v. Portland Manf. Co., 3 Sumner, 189, 201.
Stillman, etc. v. White Rock M. Co., 3 Woodbury and M., 543.
Parker v. Griswold, 17 Conn., 288.

Van Hoesen v. Coventry, 10 Barb., 521–522. **May reasonably detain but not divert. This case is followed in - - -**

Garwood v. N. Y. Cent. R. R. Co., 17 Hun., 356, **where at pages 360, 361 the court uses this language: "As the case stands, then, the defendant has *diverted* the water without right, and to the plaintiff's injury. its use therefore could not be reasonable." This judgment was affirmed in 83 N. Y., 400, and was followed in** *Smith v. City of Rochester*, 92 N. Y. 463. **See opinion at pages 473 and 486.**

Plumleigh v. Dawson, 1 Gillman, (Ill.) 544.

Kensit v. G. E. Ry. Co., 27 L. R. Ch. Div., pp. 129, 130, 131, 132.

Kimberly and Clark Co. v. Hewitt, 79 Wis., in opinion, p. 337.

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